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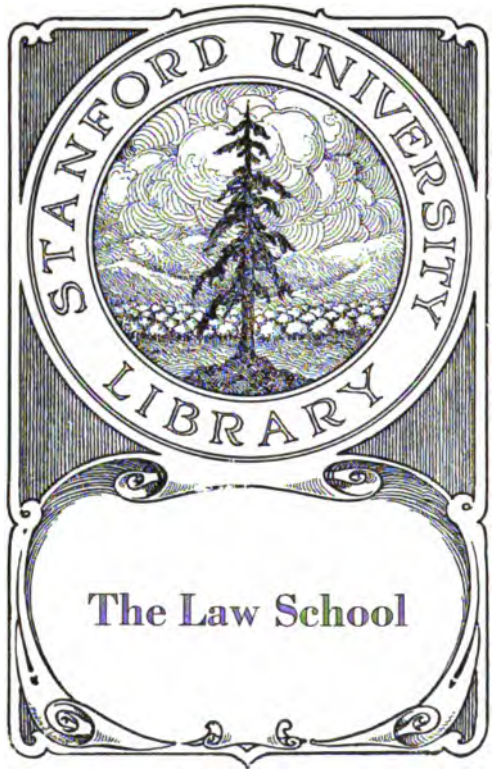

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CALIFORNIA

CORPORATION LAW

GOVERNING ORDINARY BUSINESS CORPORATIONS

AS CONTAINED IN THE CODES AND OTHER STATUTORY LAW; DECISIONS OF THE SUPREME COURT REPORTED IN VOLS. 1 TO 170, INCLUSIVE; OF THE DISTRICT COURTS OF APPEAL REPORTED IN VOLS. 1 TO 28, INCLUSIVE, AND OF BOTH IN VOLS. 1 TO 7, INCLUSIVE, OF CALIFORNIA UNREPORTED CASES

WITH FORMS

BY

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SAN FRANCISCO

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PREFACE

This book grew out of the author's needs in his own practice. The corporation laws of California are so unlike those of eastern states, that even extensive knowledge of the laws of those states is of but little value in corporation matters here. This is shown by the infrequent citation by our appellate courts of decisions from other states.

What is found to be so much needed by California lawyers is, not a work covering the subject generally and drawn from the entire field of the law, but one which deals solely with California law—the great body of the general law on this subject is fully covered in the monumental works of Thompson, Cook, Clark & Marshall, and others. Nor has the author found works on any topic which cover a dozen western states at all satisfactory as a working tool in California; the statutes and the decisions of the states differ in so many important particulars that we are usually led by them into by-ways which end nowhere, or into positive error, so far as California is concerned.

If there is no California decision on a point or principle no mention of the point is made herein; for such things the reader is referred to the great works mentioned. In short, it is California law, pure and simple; what the reader finds is the law here; a certainty so necessary to the busy practitioner in this state.

Nor is any rule of selection adopted; it is enough that the point has been contested and that the appellate courts have been called upon to settle it, and have deemed it of enough importance to express their opinion upon it. This will account for a number of cases

cited where the well informed lawyer will think the principle or point really elementary or self-evident. The writer is of the opinion that if cases are omitted which he does not think of importance, the value of the work would be greatly impaired—for others might not be of the same opinion.

All the statutes governing ordinary corporations have been copied in full. But all statutes of a special character, like those applicable only to wagon roads, ferries, bridge companies, street railroads, gas, water and electric light companies, and steam railroads, have been omitted; to include those statutes would alone fill a book of more than twice the size of this, without noting a single decision on any law or point. Besides, the omitted statutes are of interest to only a limited number; the need felt, and so often expressed, is for the law governing the great mass of ordinary business corporations.

Nor is any point stated which is not peculiar to corporations. The fact that a corporation was a party to the questions is without significance, if the case involved only some feature of the law affecting natural persons in the same manner as corporations.

To condense the vast matter on this subject has added enormously to the labor required and time expended. Nearly twelve hundred cases have been considered; and, as each case usually involves several questions, the citations run up to several thousand. It is only occasionally, and where it seemed indispensably necessary, that quotations have been made—moderate quotation would have easily extended this work to three or four volumes. The writer believes the value of a work of this character is increased by condensing a point into a line or part of a line, and in securing continuity of thought—in other words, avoiding the digest form of composition and expression.

To sum up the effect of distinguishing and conflicting decisions is often very difficult, sometimes impossible.

The field was wholly unexplored; there were no guide posts or monuments. If in these untrodden ways the author has failed to observe some object, or properly to apprehend its appearance or significance, it would be no cause for wonder. For such failures he asks indulgence.

FABIUS M. CLARKE.

SAN FRANCISCO, June 10, 1916.

TABLE OF CONTENTS

CHAPTER I

PAGE

Origin and character of corporations..... 1
Privileges and charters..... 3, 4
Wavering favor and disfavor..... 6, 7
Untrue definitions—False principles..... 7, 8
Franchise to exist..... 9
No special privileges..... 10
To be formed under general laws..... 10
Lending public credit to, prohibited..... 12
Public service corporations..... 13
Property of corporations subject to eminent domain..... 15
Chinese employment..... 15
Definition of corporations..... 15
How formed..... 15, 17
For what purposes..... 16
What public, what private..... 16
Quasi-public corporations..... 16
Corporations before codes..... 18

CHAPTER II

ARTICLES OF INCORPORATION

What to contain..... 19
First—Name..... 23
Change of name..... 23
Name not to duplicate another..... 25
Second—Purposes..... 27
Third—Office and principal place of business..... 27, 45
Fourth—Term of existence..... 29, 42
Fifth—Number of directors..... 30
Sixth—Capital stock..... 31
Seventh—Stock subscribed..... 33
Amending Articles..... 35

PAGE
Increasing or decreasing directors..... 41
Extending corporate existence.....29, 42
Change of principal office.....27, 45
Trust companies.....46, 47
Subscribing Articles..... 48
Filing Articles—Name—Evidence.....50-56
Articles not filed—Unable to sue..... 55
Legislature amending laws—Dissolution..... 57
Copy of Articles evidence..... 58

CHAPTER III

ATTACKING ORGANIZATION

To organize within one year.....61, 62
Ceasing to do business—Forfeiture.....62, 63
Collateral attack on organization..... 64
Maintaining office—Transfer records 70

CHAPTER IV.

POWERS

Powers of corporation..... 72
Succession 80
Right to sue and be sued..... 80
Seal 80
Real estate—Holding and selling.....84, 91
Stock in other corporations..... 89
Pledging or mortgaging shares..... 90
Ultra vires transactions 92-103
Banking prohibited..... 103

CHAPTER V.

FICTITIOUS STOCKS AND BONDS

Constitutional provision 106
Instances 108-114
Bonds may be sold at a discount..... 114
Discordant decisions..... 115

CHAPTER VI

INCREASING OR DIMINISHING STOCKS AND BONDS

PAGE
Civil Code, section 359....116-121
Instances....122-127
Declaring debt due on interest default.... 127
Selling property as a whole under mortgage.... 131
Trustee represents all bondholders.... 132
Receiver's certificates.... 132
Consolidation of debts.... 132

CHAPTER VII

ALIENATION OF FRANCHISE

Constitutional provision.... 136
Civil Code, section 361a, provision.... 137
Sale of franchise on execution.... 141
Purchaser to conduct business of corporation.... 143
Misnomer.... 144

CHAPTER VIII

BY-LAWS

Code provisions.... 147
Instances....148-151
What by-laws may provide.... 151
Inspectors of elections.... 153
Quorum of stockholders.... 154
Voting by proxy.... 154
Directors' qualifications.... 155
Notice of meetings.... 156
De facto directors.... 157
Officers, compensation and duties.... 157
Newspaper for publication.... 161
Extent of by-laws.... 161
Recording, inspection, etc....162, 164
Certification.... 163
Amending.... 164
By-law may be waived.... 166

CHAPTER IX

STOCKHOLDERS' MEETINGS

PAGE

Constitutional provisions 167
Code provisions 167, 168
Quorum 182, 183
Majority 168, 183
Election and appointment distinguished..... 169
Cumulative voting 170
As to foreign corporations..... 172
Conduct of elections..... 173
Proxies 173, 182, 184, 189, 190
Filing proxies..... 189
Proxies are revocable..... 189
Election of directors to be annually..... 175
Waiver of notice of meeting.....175, 178, 195
Directors holding over..... 176
Notice of meetings..... 177
Voting trusts and pooled stock..... 179
Who are stockholders..... 184
Viva voce voting..... 189
Pledgor or pledgee voting.....190, 191
Adjournments of meetings..... 191
Voting stock held in another corporation..... 192
Treasury stock can not vote..... 194
Powers of meetings..... 196
Financial statements for meetings.....196, 197
Where meetings held..... 198
Justice of peace may order meeting..... 198
Election disputes decided by superior court..... 199
Effect of appeal..... 202
Mandamus not proper to try title to office..... 204
Mandamus to compel performance of duties..... 204

CHAPTER X

DIRECTORS

Powers exclusive 206
Real estate contracts..... 210
Owning stock 211

PAGE
Quorum 211, 221
Personally interested in contracts 212
Ratification of acts by stockholders 214
Corporations having same directors or stockholders . . 215, 216
Resignation and successors 216
Injunctions against acts 216
Must be assembled 217, 223
Vacancies 217
Place of meeting 218
Directors are trustees 218
Holding over 219
De facto directors 219
Organization of board 219
Election of officers 220
Duties 221
Calls for meetings 225, 230
Adjournments 226
Adjourned meetings, limits of powers 229
Waiver of notice of meetings 234
Removal of directors 235

CHAPTER XI

SUBSCRIPTIONS FOR STOCK

Subscription contracts, generally 238
Subscription, fixing terms of payment 240
Subscription can not be diverted to another corporation. 241
Subscription, cancellation of 241
Rescinding purchase of stock 242
Over-subscription 244
Subscriptions before organization 245
Representations in procuring 246
Agreement to repurchase stock 247

CHAPTER XII

STOCKHOLDER'S RIGHTS AND DUTIES

Generally 248
No right to make further subscriptions 248

PAGE
No *mandamus* to secure private rights..... 249
Stockholder's suits in behalf of corporation..... 249
Stockholder's suits—Disability of corporation to sue.... 250
Stockholder's suits—Grounds for 253
Stockholder's suits—Misjoinder 258
Stockholder's suits—Limitation 260
Stockholder's suits—Libel in complaint 260

CHAPTER XIII

OFFICERS OF CORPORATIONS

President, powers and duties of..... 261
President, if benefited by contract..... 266
Seal generally unnecessary..... 264
Creditor in control of corporation..... 267
Loans by officers to corporation..... 268
Purchasing claims against corporation..... 274
Purchasing property of corporation 275
Purchasing property for corporation..... 276
Secret profits..... 276
Authority under by-laws..... 277
Ratification of president's acts..... 277
Where general authority is given..... 281
Secretary 284
General manager..... 287
Agents 288
Liability for funds stolen..... 291
Selling property at inadequate price..... 292
Appointing subordinate officers..... 292
Removal of officers and agents..... 293
Liability on corporation's notes..... 293
Verbal agreement to elect a person president..... 296
Agency to sell real estate..... 296
Executive committee 297
Officers charged with notice of customs and usages..... 299

CHAPTER XIV

CERTIFICATES OF STOCK

PAGE
Code provision 300
General subject 300
Common and preferred stock 305
How transferred 306
Shares of stock are personal property 307
Situs of stock 308
Held by foreign executor, etc 310
Right of transfer 313
Corporation must make transfer 313
Conversion of stock by corporation 316
Specific performance of contract to sell 318
Lien of corporation preventing transfer 318
Certificates non-negotiable 319
Identity of shares continuous 321
Indorsement and delivery sufficient 321
Manner of transfer 323
Law governing validity of transfer 326
Transfer without indorsement 327
Pledge of stock 327, 335
Fraud in sale of stock 330
Transfer as against attachment, etc 334
In name of trustee 339
Lost or stolen certificates 339, 348
Lost or destroyed bonds 350
Ratification of transfer—Estoppel 342
What amounts to a transfer on books 343
Gift in anticipation of death 344
Stock in water companies 345
Transfers by married women 346
Transfers by non-residents 347
Certificates in safe deposit box on death of owner 352

CHAPTER XV

SALES OF STOCKS ON MARGINS

Constitutional provision 354
Decisions 355

CHAPTER XVI

STOCKHOLDER'S LIABILITY

PAGE

Constitutional provision 359
Civil Code provision..... 360
Generally 362
Liable as principal, not as surety..... 363
Who are stockholders..... 368
What stockholders are liable..... 375
Measure of liability..... 377
Incorporations without stock..... 378
Contribution 378
Release of liability..... 380
Liability of in foreign corporations..... 382
Two liabilities, one to pay stock up to par and another under statutes, etc..... 386
Capital and subscriptions a trust fund..... 386
Payment of debt in satisfaction of..... 390
Creditors' bills to enforce subscriptions..... 391
Assessments on subscriptions..... 395
Liability on stock issued for property..... 395
Limitation of actions to enforce liability..... 399
Liability on preferred same as on common..... 414

CHAPTER XVII

LIABILITY OF DIRECTORS

Constitutional provision..... 415
Civil Code provision—Waiving..... 415
Generally 416
For false reports and prospectuses..... 419
Misconduct 423
Sundry other crimes..... 425
For frauds in subscriptions and in increases of stock.... 431

CHAPTER XVIII

DIVIDENDS, CREATING DEBTS, ETC.

PAGE
Civil Code limitations..... 433
Generally..... 434
Declaring unearned dividends..... 439
Validity of agreement to repurchase stock, dependent upon dividends..... 444
Excessive debt..... 446
Reduction of capital stock..... 451
Capital not to be divided..... 451

CHAPTER XIX

ASSESSMENTS

Purpose for which assessments may be levied..... 452
Can stock be made non-assessable?..... 454
May be levied to make improvements, to conduct business and to pay debts..... 448
Distinction between levies to pay stock up to par, and on statutory liability..... 460
Liability strictly construed..... 462
Immaterial when debt contracted..... 463
Actual subscription not necessary..... 465
Trustees liable..... 466
Water company stock..... 466
Collectible by personal suit.....466, 495
Purchasers of unpaid stock..... 467
Stockholder on books only, liable..... 467
Validity of meeting making levy..... 467
Subscription contracts..... 468
Unequally paid stock..... 472
Lien on stock for assessments..... 473
Issuance of certificate not necessary..... 474
When a subscriber is not a stockholder..... 474
Contract to protect stock from assessments..... 475
Limitation of amount of levy..... 475
No assessment while previous one unpaid..... 478
What order of assessment must contain..... 479

PAGE
Notice of assessment..... 480
Publication 481
Delinquent notice..... 482
How published 483
Sale at public auction..... 484
Corporation bidding at sale..... 485
Status of stock so purchased by corporation..... 486
Extending time of sale..... 489
Not invalid for certain errors..... 490
Action for recovery of stock sold..... 491

CHAPTER XX

CORPORATION RECORDS

Civil Code provisions..... 499
Transactions which should be recorded may be proved by parol 499
Right to inspect records..... 501
Penalty for refusing inspection..... 503
Records are evidence..... 504
Falsifying records 504
Lost records, restoring..... 506

CHAPTER XXI

EXAMINATION OF CORPORATIONS

Civil Code provisions..... 507
Power of attorney general..... 507
By the legislature..... 508

CHAPTER XXII

FORFEITURE OF FRANCHISE—INVOLUNTARY DISSOLUTION

Two classes of violation of law..... 510
Action by attorney general..... 510
Civil and criminal nature of proceedings..... 512
For violation of franchise..... 514
For failure to organize, or continue business..... 515

PAGE
No receiver appointed..... 518
Who must be made defendants..... 518
Organization, substantial compliance with law..... 519
Taking too great power in Articles..... 520
Statute of limitations..... 520

CHAPTER XXIII

VOLUNTARY DISSOLUTION

Must be done through superior court..... 521
Trust companies—Special method..... 526

CHAPTER XXIV

RECEIVERS

Civil Code provisions..... 527
Directors as trustees generally in lieu of.....528, 538
Equity has no power to appoint..... 530
Discussion.....530 *et seq.*
Notice of application for..... 535
On removal of directors..... 536
Other grounds for..... 536
Of income, rents and profits..... 537
Appeal now supersedes prohibition..... 539

CHAPTER XXV

INSOLVENCY

When is a corporation insolvent?..... 540

CHAPTER XXVI

CHANGE OF NAME

Code provisions..... 545
Must be made by superior court..... 545

CHAPTER XXVII

WHERE A CORPORATION MAY BE SUED

PAGE
Constitutional provision..... 549
Discussion .....549 *et seq.*
Civil Code provision..... 553
Discussion .....553 *et seq.*
Residence of corporation..... 558
Foreign corporation..... 568

CHAPTER XXVIII

MANNER OF COMMENCING ACTIONS AGAINST CORPORATIONS

Code provisions..... 569
Service of process on..... 570
Corporation may record evidence of residence..... 573

CHAPTER XXIX

ATTACHMENT AND EXECUTION—LEVYING ON SHARES

Code provisions..... 575
Decisions .....575 *et seq.*
Dividends held by..... 578

CHAPTER XXX

ACKNOWLEDGMENT OF INSTRUMENTS

Civil Code provisions..... 579

CHAPTER XXXI

PLEADINGS

Generally .....581 *et seq.*
Verification of..... 584

CHAPTER XXXII

NOTICE TO CORPORATION

PAGE
What is notice to a corporation.....586 *et seq.*

CHAPTER XXXIII

PROMOTERS

California cases on that subject.....589-605
Promoters are not the corporation..... 604
Assignment of promoter's contracts..... 604

CHAPTER XXXIV

FOREIGN CORPORATIONS

Internal affairs of, not subject to control of state..... 606
Conditions of doing business in California..... 607
Organizing in California not illegal..... 609
Designation of person to be served with process..... 609
Service on secretary of state, certain void..... 610
If no person designated..... 610
Service on managing agent 611
Service on secretary of state is constructive only..... 612
Right to benefit of statute of limitations.....614, 617
If Articles not filed..... 615
Proof of appointment of agent necessary..... 616
Quære as to managing agent..... 617
Right to defend actions.....617-622
May file Articles after suit commenced..... 623
Taking mortgage..... 624
Imposing unlawful conditions upon..... 625
Venue of actions against.....626-630
More favorable conditions of doing business..... 631
Filing Articles.....633-637
Penalty for failure to file Articles..... 633

CHAPTER XXXV

TAXATION

PAGE
No taxation of shares ordinarily..... 638
Taxation of stock of foreign company..... 643
Taxation of public service corporation..... 644

CHAPTER XXXVI

Miscellaneous matters..... 646

CHAPTER XXXVII

FEES FOR INCORPORATION

Political Code provisions..... 647
Foreign corporations..... 649

CHAPTER XXXVIII

ANNUAL LICENSE TAX—FRANCHISE TAX

Statutes of 1915.....654 *et seq.*
Old law.....653-655
Forfeiture for non-payment.....660 *et seq.*
Restoration of rights..... 662
Sundry decisions.....666-670
Occupation tax..... 671
Directors are trustees to liquidate..... 671
Social clubs..... 672
Franchise tax..... 672
Sundry sections of the law.....673-678

CHAPTER XXXIX

MINING CORPORATIONS

Posting balance sheets..... 679
Penalties..... 680
Mandamus—Foreign corporations..... 680
Transfer agencies..... 681

PAGE
Consolidations of 681
Books to be kept, and inspection of same..... 683
Stockholder's right to examine mine..... 684

BLUE SKY LAW

OR

INVESTMENT COMPANIES ACT

Statutes of 1913 in full.....687-697

FORMS

General object clauses.....699-703
Special object clauses 703-718
Sundry forms.....719 *et seq.*

TABLE OF CASES

A

PAGE

Abbott v. Jack, 136 Cal. 513.....369, 370
Abbott v. 76 Land & Water Co., 87 Cal. 323..... 286
Abietine Medical Co., Green v.....112, 302, 452, 459
Aiken v. Quartz Rock etc., 6 Cal. 186..... 570
Aetna Indemnity Co. v. Altadena etc., 11 Cal. App. 165..... 230
Agassiz, Kohler v.....240, 246, 468, 473, 497, 498, 544
Aisbett v. Paradise Mg. Co., 21 Cal. App. 267..... 564
Alaska etc., Bank of British etc. v..... 608
Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567..... 582
Albert Kinney Co., Llewellyn Iron Works v.....208, 668
Albert, Interstate Amusement Co. v..... 637
Albert Pick & Co. v. Jordan, 169 Cal. 1..... 668
Alferitz v. Scott, 130 Cal. 474..... 538
Allenberg, Zellerbach v.....158, 434
Allen v. Central Counties etc., 21 Cal. App. 163.....209, 287, 290
Allen v. Citizens Steam etc., 22 Cal. 28..... 290
Alleghany Min. Co., Hennessey v..... 495
Allert, Jones v..... 605
Allment, Dannebroge v..... 64
Altadena etc., Aetna etc. v..... 230
Alta Placer etc., Alta Silver etc. v.....88, 126, 208, 224, 233, 263
Alta Silver etc. v. Alta Placer etc., 78 Cal. 632.....
.....88, 126, 208, 224, 233, 263
Alta Tel. Co., California etc. v..... 79
Altpeter v. Postal etc., 26 Cal. App. 705..... 581
Ambrose v. Evans, 66 Cal. 74..... 338
American etc., Eddy v..... 279
American Wheel Co., Lum v.....359, 380, 456, 457, 473
American etc. Wireless etc. Co. v. Superior Court, 153 Cal. 533..
.....543, 616, 618, 622, 636
Anaheim etc., McDermont v.....38, 257, 346
Anchor etc., Love v..... 588
Anderson v. Byrnes, 122 Cal. 272.....679, 685
Anderson, Eva v.....403, 405, 407
Anderson v. Nawa, 25 Cal. App. 151..... 364
Andres v. Fry, 113 Cal. 124.....31, 84, 289, 298
Anglo-California Bank v. Field, 146 Cal. 644-650.....56, 608, 624

PAGE

Anglo-California Bank v. Grangers Bank, 63 Cal. 359.....
.....162, 309, 313, 318
A. P. Hotaling & Co. v. Brogan, 12 Cal. App. 500..... 585
App, Manning v.....140, 215, 334, 335, 374, 577
Arcata v. Arcata etc., 92 Cal. 464.....43, 62, 514
Arcata etc., Arcata v.....43, 62, 514
Arctic Ice etc., McTigue v.....88, 140
Argenti v. San Francisco, 16 Cal. 256..... 77
Argues v. Union Savings Bank, 133 Cal. 139..... 539
Armour, Harrison v.....107, 113, 257, 304, 398
Armstrong, Thomas v..... 141
Armstrong, King v..... 408
Arnold v. Johnson, 66 Cal. 402..... 338
Arnold, Tuller v..... 285
Arastraville etc., Middleton v.....31, 126, 176, 248, 256, 270
Arroyo Ditch etc. v. Superior Court, 92 Cal. 47..... 494
Arroyo Ditch etc. Co. v. Dorman, 137 Cal. 611-613..... 346
Arthur, Hurlburt v.....330, 369, 372
Ashurst Oil Co., Williams v..... 180
Ashton v. Dashaway Assn., 84 Cal. 69.....254, 255, 440
Ashton v. Heggarty, 130 Cal. 516..... 316
Ashton v. Zeila Mining Co., 134 Cal. 408-410.....322, 374, 438
Ashworth, Mutual etc. v..... 10
Ashworth, Thomason v..... 11
Atchison etc. R. R. Co., Waechter v.....568, 628, 632, 634
Atkins v. Gamble, 42 Cal. 86-99.....309, 320, 328
Atkinson v. Western Dev. Co., 170 Cal. 503.....134, 216
Atlantic etc. v. Woodbridge etc., 79 Fed. 842..... 111
Atwood v. Little Bonanza etc., 13 Cal. App. 594..... 566
Auburn, Hall v..... 210
Auburn, Nicholson v..... 55
Auburn Opera House etc. v. Hill, 3 Cal. Unrep. 839..... 240
Auburn Opera House etc. v. Hill, 113 Cal. 332..... 240
Auburn etc., People v.....44, 58
Avery v. Cullen, 15 Cal. App. 413..... 247
Ayers v. Green G. M. Co., 116 Cal. 333..... 588
Ayers, Snediker v.....213, 274

B

Babcock, Baines v.....80, 254, 369, 386, 388, 392, 393, 465
Babcock, Bidwell v.....362, 365, 367
Backus etc. v. Fort Street etc., 169 U. S. 557-559..... 563
Backman, Haynes v..... 572
Bacon v. Grosse, 165 Cal. 481..... 249
Bacon, Hardenbeigh v..... 328

PAGE
Bacon v. Irvine, 70 Cal. 221-225 255
Bacon v. Soule, 19 Cal. App. 428 219
Bacon, Wallace v. 243
Bagley, People v. 11
Bailey v. Cox, 102 Cal. 333 565
Bailey, Evans v. 90, 505
Bailhache, Bank of Healdsburg v. 210
Baines v. Babcock, 95 Cal. 581-589 .. 80, 254, 369, 386, 388, 392, 393, 465
Baines v. Story, 30 Pac. 777 392
Baines v. West Coast etc., 104 Cal. 1-7 391
Baker v. Ducker, 79 Cal. 365-372 150
Baker v. Fireman's Fund etc., 73 Cal. 182 561
Bakersfield etc. v. Chester, 55 Cal. 98 52
Baldwin, Larrabee v. 363, 367, 378, 379
Baldwin v. Miller & Lux, 152 Cal. 454 ..... 9, 76, 438, 441, 447, 448
Baldwin v. Zadig, 104 Cal. 594 357
Balfour v. Fresno etc., 123 Cal. 395 ..... 267, 279, 280, 587
Balfour v. Woodworth, 124 Cal. 169-172 ..... 230, 233
Ball v. Tolman, 119 Cal. 358, 135 Cal. 275 679
Ballou, Lawrence v. 617
Baltic Mining Co. v. Commonwealth of Mass., 231 U. S. 68 .. 667, 668
Baltimore & O. R. R. Co., Chambers v. 620
Bandman, Schenck v. 679
Bank of British North America v. Alaska etc., 97 Cal. 28 608
Bank of British North America v. Madison, 99 Cal. 125 608
Bank of California, Bell v. 328
Bank of California, Jennings v. 302, 318
Bank of California, Ralston v. 90, 126, 313, 315, 318, 319, 451
Bank of California v. San Francisco, 142 Cal. 281 ..... 5, 9, 644
Bank of Healdsburg v. Bailhache, 65 Cal. 238, 331, 332 210
Bank of Lake, Johnson v. 376, 407
Bank of Los Banos v. Jordan, 167 Cal. 327 ..... 20, 41
Bank of National City v. Johnson, 6 Cal. Unrep. 418, 60 Pac. 776-778 ..... 228, 233
Bank of National City v. Johnston, 133 Cal. 185 ..... 228, 229, 395, 463, 476, 477, 496
Bank of Napa, Gardiner v. 362, 366, 377, 392
Bank of Orland, Herbert Kraft Co. v. 313, 316, 462, 464, 473, 492
Bank etc. v. Pacific etc., 103 Cal. 596 ..... 399, 400, 402, 411
Bank of San Luis Obispo v. Wickersham, 99 Cal. 661 ..... 90, 451
Bank of Shasta v. Boyd, 99 Cal. 604 66
Bank of Woodland v. Heron, 120 Cal. 614 537
Bank of Woodland v. Hiatt, 58 Cal. 224 330
Bank etc., Yamato v. 341
Bank of Yolo v. Sperry Flour Co., 141 Cal. 314 ..... 561, 566
Bank of Yolo v. Weaver, 3 Cal. Unrep. 569, 31 Pac. 160 ..... 239, 285, 475, 501

PAGE
Bankers etc., Yore v..... 561
Barnett, Santa Rosa Bank v.....11, 402, 403, 404, 412
Barnes v. Board of Supervisors, 13 Cal. App. 766.....68, 69, 513
Barney v. Pforr, 117 Cal. 56.....81, 264
Barmen, Stockwell v..... 287
Barrell v. Lake View etc., 122 Cal. 129.....209, 219, 230, 233, 234
Barrett, Savings Bank v..... 75
Barrett, Wetmore v..... 356
Barry, Grimwood v..... 374
Barstow v. City R. R., 42 Cal. 465..... 158
Barstow v. Savage etc., 64 Cal. 388-391.....303, 339
Bartlett Estate v. Fraser, 11 Cal. App. 373.....262, 280
Bassett v. Fairchild, 132 Cal. 652.....158, 159, 207, 210, 212, 214
Bassett v. Fairchild, 6 Cal. Unrep. 458, 61 Pac. 791.....212, 279
Bates v. Coronado Beach Co., 109 Cal. 162.....74, 75, 283, 289
Bates, Hamilton v.....265, 279
Baum, Sutter St. R. R. Co. v..... 269
Bauserman v. Blunt, 147 U. S. 647..... 621
Bay City etc. Assn. v. Broad, 136 Cal. 525..... 66
Bay View etc. v. Williams, 50 Cal. 353-357..... 499
Bean v. Pioneer Mg. Co., 66 Cal. 451..... 294
Bear River etc., Blen v.....261, 278
Beaudry, Shorb v..... 8
Bee v. San Francisco etc. R. R., 46 Cal. 249..... 160
Beecher, San Joaquin v.....
.....33, 35, 157, 219, 246, 301, 454, 465, 471, 480, 487, 496, 497
Beede v. San Mateo etc., 27 Cal. App. 653.....240, 469
Beeman v. Lovett, 46 Cal. 387..... 284
Behlow v. Fischer, 102 Cal. 208, 214, 215..... 9
Belding, San Joaquin v.....219, 454
Belmont etc., Winter v..... 339
Bell v. Bank of California, 153 Cal. 234..... 328
Bell v. Standard Quicksilver Co., 146 Cal. 706.....230, 232, 464
Bell, Staacke v..... 550
Benedict, Potts Drug Co. v..... 81
Benedict Co., Willey v.....610, 612
Bennett v. Red Cloud etc., 14 Cal. App. 728..... 139
Bentley, Wallace v..... 294
Bergin, Williams v..... 7
Bergtholdt v. Porter etc., 114 Cal. App. 85..... 624
Berkey, General Conference of Free Baptists v.....608, 611
Bernheim etc. v. Elmore, 12 Cal. App. 85..... 624
Berry v. San Francisco etc., 50 Cal. 435..... 290
Bidwell v. Babcock, 87 Cal. 32.....362, 365, 367
Big Casino etc., O'Brien v..... 617
Birks, Reclamation Dist. etc. v..... 215

PAGE
Bishop v. McKillican, 124 Cal. 321..... 583
Bishop, Yule v..... 406
Bittleson etc. v. Howard, 29 Cal. App..... 585
Black v. Harrison Home Co., 155 Cal. 121-126.....208, 261, 277
Black v. Vermont Marble Co., 1 Cal. App. 718-723..... 619
Black, Wells v.....147, 150, 380, 400, 402, 403, 411, 455
Blair v. Brownstone etc., 168 Cal. 632.....209, 281, 284
Blanc v. Paymaster M. Co., 95 Cal. 524.....134, 571, 576
Blanchard, Gregory v.....9, 138, 141, 143
Blanchard v. Kaull, 44 Cal. 440-450.....65, 294
Blanck v. Commonwealth etc., 19 Cal. App. 721..... 279
Blen v. Bear River etc., 20 Cal. 602.....261, 278
Bliss v. Kaweah Canal etc., 65 Cal. 501-504.....
.....81, 83, 261, 263, 277, 290
Bliss v. Sneath, 119 Cal. 530.....366, 400
Blodgett, Stockton Lumber Co. v..... 584
Blood v. La Serena etc., 134 Cal. 366.....96, 587, 597
Blood v. La Serena etc., 113 Cal. 225.....
.....81, 88, 209, 210, 212, 264, 279, 280, 297, 583
Blood v. La Serena, 150 Cal. 764.....386, 388, 392
Blood v. Marcuse, 38 Cal. 590..... 285
Blood, Robinson v.....64, 211, 219, 230, 365, 454, 517
Bloom v. Michigan Salmon etc., 11 Cal. App. 122..... 559
Blossburg etc., Tioga etc. v..... 621
Blunt, Bauserman v..... 621
Board of Commissioners v. Board of Trustees, 71 Cal. 310..... 44
Board of Education, Brown v.....92, 100
Board of Education, Morgan v..... 100
Board of Supervisors, Barnes v.....68, 69, 513
Board of Supervisors Yuba County, Jaques v.....68, 513
Board of Trustees, Board of Commissioners v..... 44
Board of Trustees etc., Croly v.....236, 293
Boca etc. v. Sierra Valleys R. R., 2 Cal. App. 552.....38, 52, 60
Boca Mill Co. v. Curry, 154 Cal. 326.....5, 11, 29, 44
Bogart, People v..... 514
Boggs v. Lakeport etc., 111 Cal. 354.....280, 283, 500
Bond v. Karma-Ajax etc., 15 Cal. App. 469..... 567
Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658.....285, 298
Bonney v. Tilley, 109 Cal. 346.....216, 267, 274
Boothe, McCarthy Co. v..... 578
Borgfeldt, Ray v..... 289
Bories v. Union Building & Loan Assn., 141 Cal. 74, 79..... 543
Borland v. Nevada Bank, 99 Cal. 89..... 372
Bornstein v. District Grand Lodge etc., 2 Cal. App. 624..147, 149, 150
Boston Tunnel Co. v. McKenzie, 67 Cal. 487..... 60
Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527-531.....
.....461, 463, 464, 466, 469, 476, 481, 483, 484, 490

PAGE
Boulevard Gardens etc., Schulte v.....436, 444, 447, 448, 451
Bourret, Byers v..... 56
Bowers v. Modoc etc., 117 Cal. 50..... 561
Bowie v. Grand Lodge, 99 Cal. 392..... 166
Boyd, Bank of Shasta v..... 66
Boyd v. Heron, 125 Cal. 454.....114, 377
Boyd, Moore v.....322, 366, 367, 370, 399, 400, 412
Boyle etc., Mills v.....81, 84, 230, 234, 265, 279
Bradford, Carpenter v.....314, 571, 672
Brady v. Times-Mirror Co., 106 Cal. 56.....559, 561, 567, 626
Bragg v. Martenstein, 25 Cal. App. 199..... 344
Bragg v. Cummings, 25 Cal. App. 804..... 344
Brandenstein v. Hoke, 101 Cal. 134..... 6
Branham, First Baptist Church v..... 65
Brandon v. Umpqua etc., 166 Cal. 322.....533, 662, 668
Breed, Contra Costa W. Co. v..... 78
Brewster v. Hartley, 37 Cal. 15, 27, 28....101, 155, 189, 190, 194, 588
Brewster v. Lathrop, 15 Cal. 21..... 438
Brewster v. Sime, 42 Cal. 139.....336, 339, 342
Bricker, Sierra Land etc. v.....59, 66
Briggs v. McCullough, 36 Cal. 550..... 27
Brittan v. Oakland Bank of Savings, 124 Cal. 282-289.....325, 342
Brittan, Wickersham v.....169, 202, 220, 254
Broad, Bay City etc. Assn. v..... 66
Brogan, A. P. Hotaling Co. v..... 585
Brown v. Board of Education, 103 Cal. 534.....92, 100
Brown v. Crown Gold etc., 150 Cal. 376-387.....287, 289
Brown v. Merrill, 107 Cal. 446.....367, 388, 390
Brown v. National Electric etc., 168 Cal. 336..... 287
Brown v. San Francisco etc., 58 Cal. 426.....310, 348
Brown v. San Francisco etc., 122 Cal. 648..... 561
Brown v. Valley View etc., 127 Cal. 630.....158, 210
Browne v. San Gabriel etc., 22 Cal. App. 682.....381, 458
Brownstone, Blair v.....209, 281, 284
Brumagin, Hawley v.....309, 321
Bryan, Herbert Kraft Co. v..... 213
Buck; California Fruit Exchange v..... 66
Buck v. City of Eureka, 97 Cal. 135.....558, 559, 561
Buckeye etc., McFall v.....322, 343
Buena Vista Water Co., Humphrey v..... 454
Buena Vista etc. v. Touhy, 107 Cal. 243..... 596
Buffman, Read v..... 285
Bull, Cogswell v.....80, 254
Bull, Winona Wagon Co. v.....367, 403, 411, 412
Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609, 31 Pac. 367. 289
Burbank v. Dennis, 101 Cal. 90.....594, 597

PAGE
Burger, Reclamation Dist. v..... 454
Burke v. Maze, 10 Cal. App. 576.....387, 389, 453
Burne v. Lee, 156 Cal. 221.....443, 447, 448
Burnett v. Lyford, 93 Cal. 117.....84, 89, 263
Burnham v. San Francisco Fuse Mfg. Co., 76 Cal. 26.....
.....484, 490, 491, 502, 514
Burton, Hancock v..... 554
Butler, Partridge v..... 403
Butler, Roebling's Sons v.....365, 367
Byers v. Bourret, 64 Cal. 72..... 56
Byers, Parrott v.....66, 254, 257

C

Caledonia etc., Ruck v.....462, 479
Calhoun, Cellulose etc. v..... 582
California etc. v. Alta Tel. Co., 22 Cal. 398..... 79
California etc. Bridge Co., Jager v..... 561
California etc., Chamberlain v..... 96
California etc. v. Cuddeback, 27 Cal. App. 450.....212, 213, 263
California Central Ry. Co. v. Hooper, 76 Cal. 404..... 133
California Club, Cuzner v..... 672
California Cured Fruit Assn. v. Stelling, 141 Cal. 713-720....66, 67
California Fruit Exchange v. Buck, 163 Cal. 223..... 66
California Fruit Growers etc. v. Superior Court, 8 Cal. App. 711. 536
California Insurance Co., Eureka etc. v..... 631
California National Bank v. Kennedy, 167 U. S. 362..... 98
California National Bank, Chetwood v.....,.250, 255
California National Bank, First Natl. Bank v..... 66
California Nav. Co., Trabing v.....: 290
California Safe Dep. etc. v. Sierra etc., 158 Cal. 690..... 131
California etc., McDonald v. 561, 567
California Savings etc. v. Harris, 111 Cal. 133...54, 55, 56, 583, 623
California, Hooper v..... 637
California Savings Bank, Kennedy v.....366, 400
California So. Hotel Co. v. Russell, 88 Cal. 280..... 243
California Safe etc., People v., 18 Cal. App. 732.....314, 666
California Safe etc., People v., 19 Cal. App. 414..... 243
California Southern etc. v. Southern Pac. R. R., 67 Cal. 59.... 133
California Southern R. R. v. S. P. R. R., 65 Cal. 293, 394....559, 627
California So. Ry., Loup v.....,..... 551
California Steam Nav. Co. v. Wright, 6 Cal. 258..... 582
California Sugar etc. v. Schafer, 57 Cal. 396.....375, 470, 486
California Telephone etc. v. Jordan, 19 Cal. App. 536.....
.....40, 49, 126, 726, 729
California Trona Co. v. Wilkinson, 20 Cal. App. 694.....97, 107, 396

PAGE
California Winemakers etc. v. Sciaroni, 139 Cal. 277..... 285
California etc. v. Walls, 170 Cal. 285..... 601
Calkins v. Equitable etc., 126 Cal. 531.....316, 344
Callender, California So. Hotel Co. v.....35, 240, 301, 474, 496
Camp, Fritts v..... 554
Campbell, Relley v.....207, 208, 233
Campbell v. Santa Maria Oil Co., 153 Cal. 282.....455, 474, 494
Canfield, Cheney v.....227, 229, 462, 468, 492
Canfield v. Los Angeles, 157 Cal. 617.....308, 642
Carey v. Philadelphia etc., 33 Cal. 694..... 288
Carle, Crocker-Woolworth Natl. Bank v..... 583
Carpenter v. Bradford, 23 Cal. App. 560.....314, 571, 672
Carpentier, Oakland v..... 4
Carpy v. Dowdell, 115 Cal. 677..... 288
Carstenbrook, Pittman v.....561, 568, 628
Carter, McShane v..... 139
Carter v. Meuli, 122 Cal. 369..... 138
Carver v. San Joaquin etc., 16 Cal. App. 572..... 286
Carver, Williams v.....390, 460
Carvill, Gifford v.....242, 246
Cashman v. Root, 89 Cal. 373..... 356
Casserly, Main v..... 96
Cates v. Consolidated etc., 25 Cal. App. 531..... 578
Cayot, Hall v.....327, 329
Ceas, Cook v.....404, 412
Cellulose etc. v. Calhoun, 166 Cal. 513..... 582
Centerville etc. v. Sanger etc., 140 Cal. 385..... 287
Central California etc., Preston v..... 288
Central Counties etc., Allen v.....209, 287, 290
Central T. Co. v. Wabash etc. Ry., 29 Fed. 618..... 529
Central etc. of Georgia, Clarke v..... 529
Central Pacific etc., Cohn v.....29, 559, 561, 626, 627
Central etc., Goodwin v.....279, 280
Central Pacific, Low v..... 76
Central Pacific R. R., People v.....10, 11, 581
Central Pacific R. R., Trenor v..... 266
Central etc., Wright v.....171, 200
Central St. Ry., Santa Rosa etc. R. R. Co. v..... 604
Chamberlain v. California etc., 167 Cal. 500..... 96
Chamberlain v. Pacific Woolgrowing Co., 54 Cal. 103...223, 281, 294
Chambers v. B. & O. R. R. Co., 207 U. S. 142-148..... 620
Chandler, Clopton v..... 153
Chandler v. Robinett, 21 Cal. App. 333..... 285
Chandler v. Hart, 161 Cal. 405.....40, 81, 214
Chapman v. Doray, 89 Cal. 52.....27, 679
Chappellet, National Parafine Oil Co. v.....462, 484, 489, 497

PAGE
Chase v. Southern Pacific etc., 83 Cal. 468..... 561
Chater v. San Francisco etc., 19 Cal. 246..... 5
Chemical Natl. Bank v. Havermale, 120 Cal. 601.....89, 99
Cheney v. Canfield, 158 Cal. 342.....227, 229, 462, 468, 492
Chesebrough v. San Francisco, 153 Cal. 559.....642, 644
Chester, Bakersfield etc. v..... 52
Chetwood v. California Natl. Bank, 113 Cal. 414.....250, 299
Chetwood v. California Natl. Bank, 113 Cal. 649-654.....250, 255
Chicago etc. R. Co. v. Fosdick, 106 U. S. 47..... 129
Chicago Packing Co., Richardson v..... 394
Chittyna etc., Myers v..... 494
Chollar Mining Co. v. Wilson, 66 Cal. 374-6.....200, 201, 236
Christie v. Sherwood, 113 Cal. 531..... 76
Cincinnati etc. v. Snell, 193 U. S. 30..... 563
Citizens' Bank v. Los Angeles etc., 131 Cal. 187..... 130
Citizens etc., Allen v..... 290
Citizens' Security Co. v. Hammel, 14 Cal. App. 564.....217, 263
Citizens etc., Risdon etc. v.....9, 141
Citizens' Gas, Light & Heat Co., Sayre v.....452, 455, 459, 494
City Properties Co. v. Jordan, 163 Cal. 587.....650, 656
City R. R., Barstow v..... 158
City of Eureka, Buck v.....558, 559, 561
Clabrough's Exrs., Gregory v..... 538
Clamp v. Land, 122 Cal. 167-169..... 66
Clark v. Supreme Council etc., 146 Cal. 598..... 544
Clarke v. Central etc. of Georgia, 54 Fed. 556..... 529
Clarkin, Natoma etc. v..... 86
Clay, Reid v..... 84
Cleveland etc. v. Knickerbocker T. Co., 64 Fed. 623..... 529
Clio Mining Co., Nisbet v..... 145
Clopton v. Chandler, 27 Cal. App. 595..... 153
Cockins, Cook v..... 540
Coe, Pennock v..... 129
Coghlan v. Salvatore Quartararo, 15 Cal. App. 662..... 265
Cogswell v. Bull, 39 Cal. 320.....80, 254
Cohn v. Central Pacific etc., 71 Cal. 488.....29, 559, 561, 626, 627
Colby, Farmers etc. Bank v..... 294
Coleman v. San Rafael etc., 49 Cal. 521..... 86
Coleman, Hyman v.....364, 365, 367, 399, 400, 401, 403, 404, 412
Collins, Hiller v..... 365
Collins, Ventura etc. v..... 240
Collom v. Roos Bros., 25 Cal. App. 73..... 216
Colpe v. Jubilee M. Co., 2 Cal. App. 393.....160, 293
Colton Land & W. Co. v. Swartz, 99 Cal. 278..... 87
Columbus Brewing Co., Gribble v.....96, 279
Commercial etc., Ryland v..... 405

PAGE
Commercial etc., Treasurer v. ... 318
Commercial Bank of Santa Ana, Yost v. ... 538
Commonwealth of Mass., Baltic Min. Co. v. ... 667, 668
Commonwealth etc., Blanck v. ... 279
Commonwealth, S. S. White etc. Co. v. ... 667, 668
Consolidated etc., Cates v. ... 578
Consolidated Lumber Co., First Natl. Bank v. ... 405, 406, 410
Consumers etc., Bullock v. ... 289
Consumers etc., Creditors v. ... 29, 198, 542, 565
Continental Bldg. etc., Henry v. ... 422
Contra Costa W. Co. v. Breed, 139 Cal. 432 ... 78
Cook v. Ray Mfg. Co., 159 Cal. 694, 39 Cal. Dec. 71 ... 550, 555, 562, 563, 564
Cook v. Ceas, 143 Cal. 224 ... 404, 412
Cook v. Cockins, 117 Cal. 140 ... 540
Cook, Diamond v. ... 86
Coon, Pacific Fruit etc. v. ... 35, 242, 301, 474, 476, 477, 497, 506
Coonan, Loewenthal v. ... 406
Cooper, Beach v. ... 254
Cooper, McCully v. ... 310, 311
Cooper, Rued v. ... 357
Cooper v. Spring Valley etc., 145 Cal. 207 ... 340
Cooper v. Spring Valley etc., 16 Cal. App. 17 ... 316, 340
Cooper Exr. v. Spring Valley etc., 171 Cal. ... 317, 340
Cope, Sioux Remedy Co. v. ... 623, 636
Copsey v. Sacramento Bank, 133 Cal. 659 ... 213
Corbin, Cornell v. ... 9
Cornell v. Corbin, 64 Cal. 197-200 ... 9
Cornwell, Redington v. ... 379, 401, 402, 403
Coronado Beach Co., Bates v. ... 74, 75, 283, 289
Cortelyou v. Imperial Land Co., 156 Cal. 373 ... 107, 114, 180
Cortelyou v. Imperial Land Co., 166 Cal. 14 ... 303
Coubrough, Malloye v. ... 580
Coulter Dry Goods Co. v. Wentworth, 172 Cal. ... 376, 400, 407, 408
County etc. v. Gage, 139 Cal. 406 ... 400
County of Plumas, Welsh v. ... 141
Cowdery v. London etc. Bank, 139 Cal. 298-309 ... 538
Cowles, Perkins v. ... 303, 304, 387, 389, 453, 467
Cox, Bailey v. ... 565
Cox, Odell v. ... 576
Craig v. Hesperia etc., 113 Cal. 7-12 ... 302, 303, 309, 315, 320, 321, 344, 473
Craig, Joost v. ... 580
Craig v. Wade, 159 Cal. 172 ... 419
Crandall, Hall v. ... 294
Crane, Lakeside Ditch Co. v. ... 64, 66

PAGE
Crawford, Neilson v. ... 388
Crawford, West v. ... 16, 150, 239, 245, 465, 469
Creditors v. Consumers' etc., 98 Cal. 318 ... 29, 198, 542, 565
Creditors Union etc. v. Lundy, 16 Cal. App. 561 ... 60, 65, 634
Crescent City etc., Malone v. ... 583
Crescent City Wharf etc. v. Simpson, 77 Cal. 290 ... 81
Crittenden, Raphael Weill & Co. v. ... 66
Crittenden, Wickersham v., 110 Cal. 332 ... 158
Crittenden, Wickersham v., 106 Cal. 327-329 ... 158, 255, 259
Crittenden, Wickersham v., 93 Cal. 17 ... 158, 160, 212, 223, 237, 261, 415, 536
Croake, Zierath etc. v. ... 173
Crockett, People v. ... 150, 313
Crocker v. Scott, 149 Cal. 575 ... 644
Crocker-Woolworth Nat. Bk. v. Carle, 133 Cal. 411 ... 583
Crocker-Woolworth Nat. Bk., Willey v. ... 74
Croly v. Board of Trustees of Sacramento, 119 Cal. 234 ... 236, 293
Cross v. Reid etc., 73 Cal. 302 ... 328
Crossman v. Vivienda Water Co., 150 Cal. 575 ... 523, 533
Crouch v. H. L. Miller etc. Co., 169 Cal. 341 ... 572
Crouse, Murphy v. ... 308, 310, 311
Crowley v. Genesee etc., 55 Cal. 273 ... 81, 84, 265, 279, 289, 290
Crown Gold etc., Brown v. ... 287, 289
Crystalline M. Co., Olender v. ... 613
Cuddeback, California etc. v. ... 212, 213, 263
Cullen, Avery v. ... 247
Cumberland College v. Ish, 22 Cal. 641 ... 581
Cummings, Bragg v. ... 344
Cunningham, McKee v. ... 81, 500
Curry, Boca Mill Co. v. ... 5, 11, 29, 44
Curry, H. K. Mulford Co. v. ... 634, 650, 651, 666, 667, 668
Curry, Kaiser etc. v. ... 11, 514, 518, 582, 668, 670
Curry, Lewis v. ... 514, 670
Curry, Merced etc. v. ... 122, 450, 757, 764
Curry, Navajo v. ... 108, 122, 124, 125, 749
Curry, Ukiah Guaranty Co. v. ... 672
Curtin v. Salmon etc., 130 Cal. 348 .. 211, 212, 217, 223, 224, 232, 385
Curtin v. Salmon River etc., 141 Cal. 308 ... 88, 166, 209, 214, 278, 297, 385, 588
Curtin, Sonora v. ... 11
Curtiss v. Murry, 26 Cal. 634 ... 80
Cutter, Stillwell v. ... 356, 357
Cutting Packing Co. v. Packer's etc., 86 Cal. 579 ... 364, 404
Cutting v. Oliphant, 27 Cal. App. 120 ... 408
Cuzner v. California Club, 155 Cal. 303 ... 672

D

PAGE

Dabney, Whitten v., 172 Cal.....250, 256, 260, 400
Dabney, Whitten v., 20 Cal. App. Dec. 22..... 260
Daggett v. Southwest etc., 155 Cal. 762.....382, 383, 390, 393
Danielson v. Yoakum, 116 Cal. 384.....365, 367, 380
Dansebroge v. Allment, 26 Cal. 286..... 64
Danziger, Ferrochem v.....301, 469
Dare, Gay v..... 247
Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518..... 6
Dashaway Assn., Ashton v..... 254, 255, 440
Dashaway Assn., People v.....5, 510, 511, 512, 515, 518
Dasso, Napa etc. v..... 11
Davidson, Merchants etc. v.....113, 257, 387, 391
Davidson v. Rankin, 34 Cal. 503..... 364
Davis, Dean v..... 16
Davis, Hobbs v..... 681
Davis, Hunt v..... 9
Davis, Los Angeles etc. v..... 572
Davis v. Rock Creek etc., 55 Cal. 359.....212, 216, 275
Dean v. Davis, 51 Cal. 406..... 16
Deane v. Gray Bros. etc. Co., 109 Cal. 435.....100, 266
Dear, Potter v..... 386
Deetz, Martin v.....28, 52, 60, 63, 64, 68, 516, 582
De Fremery, McDonald v.....332, 419
Delano v. Jacoby, 96 Cal. 275-281..... 297
De Lay, People v..... 429
Deming v. Maas, 18 Cal. App. 330..... 208
Dennis v. Superior Court, 91 Cal. 548..... 400
Dennis, Burbank v.....594, 597
Dennis, San Gabriel Valley etc. v.....467, 498
Dent v. Holbrook, 54 Cal. 145..... 317
Declez etc., Vermont etc. v.....
.....107, 110, 113, 256, 302, 343, 386, 387, 388, 396, 405, 462
Derby v. Stevens, 64 Cal. 287.....367, 374
De Ro, Pacific Bank v.....28, 64
Deseret Water etc. v. State, 167 Cal. 147..... 632
Dewitt v. San Francisco, 2 Cal. 289.....74, 86
Diamond v. Cook, 6 Cal. Unrep. 446..... 86
Diamond etc., Kendrick v..... 561
Diamond Match Co., Rains v..... 629
Dickinson v. Zubiate M. Co., 11 Cal. App. 656.....243, 280, 612
Dimick, Goldberg, Bowen & Co. v..... 27
District etc., Bornstein v.....147, 149, 150
Dodge Stationery Co. v. Dodge, 145 Cal. 380..... 26
Dodge, San Francisco National Bank v..... 644
Dolbear v. Wilkinson, 172 Cal..... 192

PAGE
Dole, People v. 65
Donahoe, O'Neill v. 325
Donaldson v. Orchard Crude Oil Co., 6 Cal. App. 641 284
Donohoe v. Wooster, 162 Cal. 114 565
Donohoe v. Rogers, 168 Cal. 700 555
Donohoe etc. v. Southern Pac. Ry., 138 Cal. 194 145
Doran, Gosewisch v. 260
Doray, Chapman v. 27, 679
Doray, Schofield v. 679
Dorman, Arroya Ditch Co. v. 346
Dorn, Smith v. 217, 226, 232, 255
Dorsey, Pacific Trust Co. v. 110, 424
Dow v. Gould etc. Mining Co., 31 Cal. 630 ..... 326, 438
Dow v. Swain, 125 Cal. 674 330
Dowdell, Carpy v. 288
Downey, Farmer's etc. Bank v. 415
Dover v. Pittsburg Oil Co., 143 Cal. 501-505 342
Drobaz, Moynihan v. 572, 582
Ducker, Baker v. 150
Duffy v. Duffy, 104 Cal. 602 ..... 550, 554
Duke v. Huntington, 130 Cal. 274 ..... 367, 369, 408
Dulin v. Pacific etc., 98 Cal. 304 203
Dulin v. Pacific etc., 103 Cal. 357 ..... 190, 202, 220, 296
Dunbar v. San Francisco, 1 Cal. 356 79
Duncan, People v. 138, 141
Dundon v. McDonald, 146 Cal. 585 276
Dunlap, Union Savings Bank etc. v. 395, 453, 458, 476
Dunne, Lewis v. 57
Durbrow, Krause v. 188, 323
Dye, Potomac Oil Co. v., 10 Cal. App. 534 ..... 204, 607
Dye, Potomac Oil Co. v., 14 Cal. App. 674 .. 177, 178, 204, 284, 607, 625

E

Eagle Lake etc., Keener v. 571
Eagle Lake etc., Purser v. 83
Eagle Lake, Schaake v. 134, 440, 447
Earl Fruit Co., Tustin v. 582
East Riverside etc., Fudickar v. 81, 213, 264, 267, 277, 278
East Redlands etc., Richey v. 22, 466
East San Mateo etc., E. W. McLellan Co. v. 266
Echo Oil Co., Greve v. 84, 113
Eddy v. American etc., 21 Cal. App. 487 279
Eddy v. Houghton, 6 Cal. App. 85 561
Ede v. Johnson, 15 Cal. 53 ..... 327, 585
Edison etc., Rich v. 266

PAGE
Edwards, Fenton v. ... 625
Edwards v. Sonoma Valley Bank, 59 Cal. 136 ... 317
Edwards, Wilcox v. ... 358
Eel River, Schallard v. ... 81, 127, 500
Eel River etc. v. Struver, 41 Cal. 616 ... 570
Eells v. Gray Bros. etc., 13 Cal. App. 33 ... 285
El Dora etc., Stabler v. ... 205, 233
Elliott, Payne v. ... 309, 334
Elliott v. Superior Court, 168 Cal. 727 ... 530, 532
Ellis, Gray v. ... 241
Ellis, Gulf etc. v. ... 620
Elmore, Bernheim etc. v. ... 624
Elwell v. Fosdick, 134 U. S. 500 ... 130
Emigrant Ditch Co. v. Webber, 108 Cal. 91 ... 55
Enterprise Brewing Co., McQuaide v. ... 78, 87, 97, 265, 267
Enright, Wells Fargo & Co. v. ... 283, 367, 404
Equitable etc., Calkins v. ... 316, 344
Equitable Gas etc., Gallagher v. ... 103, 138
Escondido Oil etc. v. Glaser, 144 Cal. 494 ... 82
Escondido etc., Merchants etc. v. ... 16
Estate of Thomas, 147 Cal. 236 ... 346
Estrada, San Luis Water Co. v. ... 79
Etiwanda etc., Tregear v. ... 309, 322
Eureka etc. v. California Ins. Co., 130 Cal. 153 ... 631
Eureka etc., Shively v., 129 Cal. 296 ... 254, 463, 497
Eureka etc., Shively v., 5 Cal. App. 236 ... 211, 271
Eureka Flour M. Co., Smith v. ... 73, 104
Eureka etc. v. Superior Court, 66 Cal. 311-315 ... 570, 624
Eva v. Anderson, 166 Cal. 420 ... 403, 405, 407
Evans, Ambrose v. ... 338
Evans v. Bailey, 66 Cal. 112 ... 90, 505
Evans, Jones v. ... 279, 583
Evans v. Sparks, 170 Cal. 532 ... 321
Ewing v. Oroville etc., 56 Cal. 643 ... 108
E. W. McLellan Co. v. East San Mateo etc., 166 Cal. 736 ... 266
Excelsior Water etc. v. Pierce, 90 Cal. 140 ... 434, 436, 440, 460
Ex-Mission etc. v. Flash, 97 Cal. 610 ... 591, 594
Ex parte Clarke, 126 Cal. 238 ... 502
Ex parte Henshaw, 73 Cal. 486-493 ... 513
Ex parte Kuback, 85 Cal. 274 ... 15
Ex parte McKenney, 10 Cal. App. 357 ... 427
Ex parte Spring Valley etc., 17 Cal. 136 ... 28
Eyre v. Harmon, 92 Cal. 580 ... 679

F

PAGE

Fairchild, Bassett v., 132 Cal. 652.....153, 159, 207, 210, 212, 214
Fairchild, Bassett v., 6 Cal. Unrep. 458.....212, 279
Farmer's etc. Bank v. Colby, 64 Cal. 352..... 294
Farmer's etc. Bank v. Downey, 53 Cal. 466..... 415
Farmer's etc. v. Wilson, 58 Cal. 600..... 338
Faymonville v. McCollough, 59 Cal. 285..... 365
Fay, Rondell v..... 67
Feck, Swamp etc. Dist. etc. v..... 583
Fenton v. Edwards etc., 126 Cal. 43..... 625
Ferguson v. Sherman, 116 Cal. 169..... 382
Ferguson, Simpson v..... 537
Ferries etc., Smith v.....112, 113, 215, 255, 448, 450
Ferrochem v. Danziger, 23 Cal. App. 584.....301, 469
Fetterman, Lincoln Co. Bank v.....584, 637
Field, Anglo-California Bank v.....56, 608, 624
Fidelity etc., Turner v.....112, 256, 302, 393, 395
Film Producers v. Jordan, 171 Cal..... 31
Finn, Lackenbach v.....213, 267
Fireman's Fund etc., Baker v..... 561
Fireman's Fund etc., Maynard v.....207, 290
First Baptist Church v. Branham, 90 Cal. 22..... 65
First Natl. Bk. v. California Nat. Bk., 4 Cal. Unrep. 403..... 66
First Natl. Bk. v. Consolidated Lumber Co., 16 Cal. App. 267.....
.....405, 406, 410
First Natl. Bk. v. Hawkins, 174 U. S. 364..... 98
First Natl. Bk. v. Henderson, 101 Cal. 307..... 56
First Natl. Bk. v. Pennig, 28 Cal. App. 267..... 66
First Natl. Bk. v. Shedd, 121 U. S. 74, 87..... 130
Fischer, Behlow v..... 9
Fischer v. Superior Court, 110 Cal. 129-140.....237, 530, 534, 536
Fish, Perkins v..... 416
Fites v. Marsh, 171 Cal..... 446
Flash, Ex-Mission etc. v.....591, 594
Fleisher, Kutz v..... 355
Fletcher v. Kidder, 163 Cal. 769.....336, 337, 339, 505
Flickinger v. Wrenn Invest. Co., 171 Cal..... 446
Flint, People v.....34, 519
Foley v. Foley, 120 Cal. 39..... 570
Fontana v. Pacific Can Company, 129 Cal. 51.....81, 264
Forbes v. San Rafael etc., 50 Cal. 340..... 278
Forsyth, Pettit v.....464, 475
Fort Street etc., Backus etc. v..... 563
Fortain v. Smith, 114 Cal. 494..... 10
Fosdick, Chicago etc. R. R. Co. v..... 129
Fosdick, Elwell v..... 130

PAGE
Foster v. Superior Court, 115 Cal. 279-282.....202, 203, 512
Foulke v. San Diego S. P. R. R., 51 Cal. 365..... 92
Fowles v. National Bank of California, 167 Cal. 653.....328, 342, 347
Fox v. Mackay, 125 Cal. 54-64..... 370
Fox v. Hale and Norcross etc. M. Co., 108 Cal. 369-426.....
.....188, 260, 357, 416
Fox v. Tay, 89 Cal. 339..... 310
Frame, San Diego Gas Co. v., 148 Cal. 252..... 54
Frame, San Diego Gas Co. v., 137 Cal. 444.....52, 60, 64, 87, 517, 572
Francais v. Somps, 92 Cal. 503..... 679
Francais v. Western Screen Co., 22 Cal. App. 32.....66, 262
Frank, People v..... 64
Fraser, Bartlett Estate v.....262, 280
Fraser v. San Francisco Bridge Co., 103 Cal. 79..... 266
Fraylor v. Sonora M. Co., 17 Cal. 594.....158, 299
French v. Teschemaker, 24 Cal. 518.....363, 380, 455
French Bank Case, 53 Cal. 495..254, 518, 530, 531, 533, 534, 550, 551
Fresno etc., Balfour v.....267, 279, 280, 587
Fresno etc. v. Superior Court, 83 Cal. 491.....550, 559, 560, 561, 627
Fresno etc. v. Southern Pacific Co., 135 Cal. 202.....
.....141, 142, 280, 587, 588
Fresno Canal Co. v. Warner, 72 Cal. 379.....60, 582
Fresno etc., White v..... 561
Freyberg v. Los Angeles Brewing Co., 4 Cal. App. 403..... 266
Fritts v. Camp, 94 Cal. 393..... 554
Fritts v. Palmer, 132 U. S. 282..... 636
Fromm v. Sierra etc., 61 Cal. 629..... 317
Fry, Andres v.....81, 84, 289, 298
Fudickar v. East Riverside etc., 109 Cal. 39.....
.....81, 213, 264, 267, 277, 278

G

Gage, County etc. v..... 400
Gage, Sullivan v..... 530
Galbraith v. Shasta etc., 143 Cal. 94..... 102
Gallagher v. Equitable Gas etc., 141 Cal. 706.....103, 138
Gallup v. Sacramento etc., 171 Cal.....558, 559, 627
Gamble, Atkins v.....309, 320, 328
Garden, Noble v..... 345
Garibaldi Gold Mining Co., Weeks v..... 54
Gardiner v. Bank of Napa, 160 Cal. 577.....362, 366, 377, 392
Gardiner v. Royer, 167 Cal. 238.....402, 412, 413
Garner, Loveland v..... 679
Garretson v. Pacific etc., 146 Cal. 188....35, 113, 255, 257, 301, 397
Gashwiler v. Willis, 33 Cal. 11.....82, 88, 207, 223, 224

PAGE
Gate City etc., San Joaquin etc. v.... 281
Gate City etc., Smith v....479, 489, 490, 491
Gay v. Dare, 103 Cal. 454.... 247
Gaylord, Williams v....139, 607
General Conference of Free Baptists v. Berkey, 156 Cal. 466..608, 611
Genesee etc., Crowley v....81, 84, 265, 279, 289, 290
George Frank Co. v. Leopold etc., 13 Cal. App. 59.... 611
Geo. K. Porter Co., Neuhart v.... 290
German Savings etc., Youd v.... 85
Gifford v. Carvill, 29 Cal. 589....242, 246
Gillelen, Shattuck etc. v....335, 372
Gillelen, Welch v....335, 372
Gilfallan v. Gilfallan, 168 Cal. 23....318, 438
Gilman, Westcott v.... 74
Gilson, Gorham v.... 257
Gilson Quartz M. Co. v. Gilson, 51 Cal. 341.... 501
Glaser, Escondido Oil Co. v.... 82
Glas, Watkins v.... 81
Glenn v. Saxton, 68 Cal. 353-358....239, 453, 458
Godfrey, Western Pacific Ry. v....365, 368, 371, 375, 417
Goldberg, Bowen & Co. v. Dimick, 169 Cal. 187.... 27
Golden Gate Lodge, People v....49, 52, 520
Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184....64, 66
Golden Gate etc. v. Superior Court, 65 Cal. 187.... 570
Golden State etc., Vercoutere v.....149, 150, 210, 444, 447, 451
Goldman v. Murray, 164 Cal. 419.... 223
Gold Mountain M. Co., Morrison v....256, 317
Goldstein, Reed v.... 544
Goldtree etc., Jones v....402, 403, 412
Goldy Machine Co., Tilden v....96, 299
Goodall v. Jack, 127 Cal. 258....403, 412
Goodell v. Verdugo etc., 138 Cal. 308.... 212
Goodin, Scott v.... 446
Goodwin v. Central etc., 21 Cal. App. 376....279, 280
Goodwin, Nixon v....267, 541
Goodyear, Johnson v....10, 12
Gorham v. Gilson, 28 Cal. 491.... 257
Gorrill, Spreckels v.... 331
Gould etc., Dow v....326, 438
Gosewisch v. Doran, 161 Cal. 511.... 260
Grace M. E. Church, Thomasson v.... 286
Grand Lodge, Bowie v.... 166
Granger v. Original Empire etc., 59 Cal. 678-682.....232, 233, 496
Granger's Bank v. Superior Court, 4 Cal. Unrep. 130.... 554
Granger's Bank, Anglo-California Bank v.....162, 309, 313, 318

PAGE
Grant v. Los Angeles etc., 116 Cal. 74..... 530
Graham v. Pasadena Land etc., 152 Cal. 596..... 88
Granite etc. v. Maginness, 118 Cal. 138.....77, 86, 139
Grass Valley etc., Sullivan v..... 583
Graves v. Mono etc. Mining Co., 81 Cal. 303-325.....
.....168, 213, 218, 303, 325
Gray Bros. etc. Co., Deane v.....100, 266
Gray Bros. etc., Eells v..... 285
Gray v. Ellis, 164 Cal. 481..... 241
Gray Bros. etc., Hawley v.....83, 281
Gray, Shanklin v.....679, 680
Green v. Abietine Medical Co., 96 Cal. 322.....112, 302, 452, 459
Green G. M. Co., Ayers v..... 588
Green v. Beckman, 59 Cal. 548.....363, 400
Green etc. R. Co., Guaranty Trust etc. Co. v..... 130
Greenleaf v. Jacks, 133 Cal. 506.....392, 394
Greenleaf v. Jacks, 135 Cal. 154..... 394
Gregory v. Blanchard, 98 Cal. 313.....9, 138, 141, 143
Gregory v. Clabrough's Exrs., 129 Cal. 475-478..... 538
Grieg v. Riordan, 99 Cal. 316.....265, 279, 288
Greve v. Echo Oil Co., 8 Cal. App. 275.....84, 113
Gribble v. Columbus Brewing Co., 100 Cal. 67-71.....96, 279
Griffin v. Magnolia etc., 107 Cal. 381.....388, 561, 567
Griffith v. New York Life Ins. Co., 101 Cal. 64..... 102
Grimbley v. Harrold, 125 Cal. 30..... 164
Grimwood v. Barry, 118 Cal. 274..... 374
Grocers etc. v. Kern etc., 150 Cal. 466.....
.....552, 553, 555, 557, 561, 563, 567, 623
Grosse, Bacon v..... 249
Gross, Hurwitz v..... 504
Guaranty Trust etc. Co. v. Green etc. R. Co., 139 U. S. 137..... 130
Gulf etc. v. Ellis, 165 U. S. 154..... 620
Gunn, Lacy v..... 139
Gunn, People v.....69, 519
Guy M. Rush Co., Hoffman v.....262, 265, 287, 288, 289

H

Hager, Reclamation Dist. v..... 149
Hale & Norcross etc. M. Co., Fox v.....188, 260, 357, 416
Hall v. Auburn, 27 Cal. 256..... 210
Hall v. Cayot, 141 Cal. 13-17.....327, 329
Hall v. Crandall, 29 Cal. 567..... 294
Hamilton v. Bates, 4 Cal. Unrep. 371.....265, 279
Hamilton, Le Mesnager v..... 580
Hamilton, Selig v..... 367

PAGE
Hammel, Citizens Security Co. v.....217, 263
Hammond v. Ocean Shore etc., 22 Cal. App. 167..... 564
Hammond v. Haskell, 14 Cal. App. 522..... 126
Hancock v. Louisville etc. Ry. Co., 145 U. S. 409..... 193
Hancock v. Burton, 61 Cal. 70..... 554
Hanford etc. Co. v. Sowlveere, 11 Cal. App. 261..... 375
Hanson v. Sherman, 25 Cal. App. 169.....101, 365, 372
Happy Valley etc. v. Nelson, 169 Cal. 694..... 73
Hardenbeigh v. Bacon, 33 Cal. 356..... 328
Harding v. Vandewater, 40 Cal. 78-83.....217, 225, 233, 463, 468
Harmon, Eyre v..... 679
Harmon v. Page, 62 Cal. 448.....362, 368, 386, 391, 497
Harrigan v. Home Life Ins. Co., 128 Cal. 531-542.....102, 617
Harris, California Savings etc. v.....54, 55, 56, 583, 623
Harris v. McGregor, 29 Cal. 127-9.....21, 28, 198
Harris v. San Francisco Sugar etc., 41 Cal. 393..... 438
Harrison v. Armour, 169 Cal. 787.....107, 113, 257, 304, 398
Harrison Home Co., Black v.....208, 261, 277
Harrison v. Hebbard, 101 Cal. 152..... 533
Harrold, Grimbley v..... 164
Harshall, Reed & Co. v.....614, 672
Harvey v. Meigs, 17 Cal. App. 353.....254, 258, 259
Hart, Chandler v.....40, 81, 214
Hartford etc. v. Jordan, 168 Cal. 270..... 671
Hartley, Brewster v.....101, 155, 189, 190, 194, 588
Hartman, Ventura etc. v.....240, 464, 470
Hassett, Hobson v..... 294
Haskell, Hammond v..... 126
Hatton v. Holmes, 97 Cal. 208..... 580
Havemeyer v. Superior Court, 84 Cal. 361-380.....511, 530, 533
Havemeyer v. Superior Court, 87 Cal. 267..... 530
Havermale, Chemical Natl. Bank v.....89, 99
Hawke v. California Realty etc., 28 Cal. App. 377..... 448
Hawkins, First National Bank v..... 98
Hawkins v. Mansfield G. M. Co., 52 Cal. 513..... 256
Hawley v. Brumagin, 33 Cal. 394-9.....309, 321
Hawley v. Gray Bros. etc., 106 Cal. 337.....83, 281
Haynes v. Backman, 3 Cal. Unrep. 710..... 572
Hayward v. Rogers, 62 Cal. 348.....328, 330
Hebbard, Harrison v..... 533
Hecht, Herman v.....367, 386, 388, 403
Heggarty, Ashton v..... 316
Hellman v. Logan, 148 Cal. 58..... 566
Hellman, Market St. Ry. Co. v.....11, 58, 67, 77, 87, 89, 121, 133, 135, 140, 149, 155, 184, 186, 189, 191, 193, 371, 488
Hellman, Temple St. Ry. v..... 76

PAGE
Henderson v. Western Gas Engine Co., 8 Cal. App. 247..... 293
Henderson, First National Bank v..... 56
Hennessey v. Alleghany Min. Co., 159 Cal. 398..... 495
Henningsan, Richter v..... 248
Henry v. Continental Bldg. etc., 156 Cal. 667..... 422
Herberger, Lankershim Ranch etc. v..239, 301, 302, 309, 318, 473, 474
Herbert Kraft Co. v. Bank of Orland, 133 Cal. 64.....
.....313, 316, 462, 464, 473, 492
Herbert Kraft Co. v. Bryan, 140 Cal. 79..... 213
Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 702..... 417
Herman v. Hecht, 116 Cal. 553.....367, 386, 388, 403
Herman, Wood etc. v..... 394
Heron, Bank of Woodland v..... 537
Heron, Boyd v.....114, 377
Herron, R. H., Co. v. Shaw, 165 Cal. 668.....
.....107, 113, 257, 388, 396, 458, 497
Herron, R. H., Co. v. Superior Court, 136 Cal. 279..... 542
Herron Co. v. Westside etc., 18 Cal. App. 778.....571, 611
Herzo v. San Francisco, 33 Cal. 134..... 101
Hesperia etc., Craig v.....302, 303, 309, 315, 320, 321, 344, 473
Hewitt, Jefferson v., 95 Cal. 535.....241, 246
Hewitt, Jefferson v., 103 Cal. 624.....110, 241, 246, 286, 424, 587
Hewlett, San Joaquin v..... 454
Hiatt, Bank of Woodland v..... 330
Hibernia Sav. etc., Kennedy v..... 570
Hibernia etc. Soc., McCallion v..... 22
Hibernia etc. Soc., People v..... 507
Higgins v. California Petroleum etc. Co., 122 Cal. 376..... 134
Higgins v. California Petroleum etc. Co., 147 Cal. 363..... 134
Highland Park etc. v. List, 27 Cal. App. 761..... 276
Hildreth, Monterey etc. v.....33, 238, 374, 465, 471
Hildreth v. Montecito Creek Water Co., 139 Cal. 22..... 346
Hill, Auburn Opera House etc. v..... 240
Hill, Neall v.....159, 200, 237, 518
Hill, People v..... 191
Hill, Sonoma etc. v.....364, 365, 394, 404
Hiller v. Collins, 63 Cal. 239..... 365
Hinkel, Johnson v.....400, 404, 409
Hitchcock, San Joaquin v..... 454
H. L. Miller etc. Co., Crouch v..... 572
Hoag v. Howard, 55 Cal. 564..... 580
Hobbs v. Davis, 168 Cal. 556..... 681
Hobbs v. Tom Reed Min. Co., 164 Cal. 497..... 681
Hobson v. Hassett, 76 Cal. 203..... 294
Hobson v. Pacific States etc., 5 Cal. App. 94, 101.....530, 534
Hocknell, Hercules Oil etc. Co. v..... 417

PAGE

Hoffman v. Guy M. Rush Co., 27 Cal. App. 167.....
.....262, 265, 287, 288, 289
Hoke, Brandenstein v..... 6
Holbrook, Dent v..... 317
Holiness Church v. Metropolitan Church Assn., 12 Cal. App. 445. 613
Hollister etc., Shaw v..... 139
Hollywood etc. Assn., O'Dea v.....
..110, 157, 302, 303, 304, 381, 454, 462, 465, 467, 469, 472, 477, 485
Holmes, Hatton v..... 580
Holmes, International etc. v..... 624
Holmes v. Salamanca etc., 5 Cal. App. 659..... 582
Homan v. Wayer, 9 Cal. App. 123..... 580
Home Life Ins. Co., Harrigan v.....102, 617
Home Life Ins. Co., Osborne v..... 102
Hooper v. California, 155 U. S. 648..... 637
Hooper, California Central Ry. Co. v..... 133
Hopkins, Western Union Tel. Co. v..... 644
Horn etc. v. New York, 143 U. S. 305..... 9
Horrell, Mudgett v..... 372
Horseshoe Pier etc. v. Sibley, 157 Cal. 444-6.....
.....33, 238, 240, 246, 465, 468, 469, 471, 477
Horton v. Remillard Brick Co., 170 Cal. 384.....159, 298
Houghton, Eddy v..... 561
Houghton, Sayward v..... 315
Houser, Stockton Com. Harvester etc. v.....
.....230, 234, 303, 467, 483, 496
Howard, Bittleson etc. v..... 585
Howard, Hoag v..... 580
Howard, Stein v..... 110
Howard, Winchester v.....257, 417, 430, 561
Howes etc., Woodroof v.....257, 276, 292, 415
Hoyt, Sheer v..... 422
Hubbard v. University Bank, 125 Cal. 684..... 127
Hudepohl v. Liberty Hill M. Co., 80 Cal. 559..... 78
Hudson v. Seeley etc., 19 Cal. App. 213.....247, 287
Hughes Mfg. Co. v. Wilcox, 13 Cal. App. 22...112, 301, 365, 369, 500
Humphrey v. Buena Vista Water Co., 2 Cal. App. 540..... 454
Humphreys, Quincy etc. R. R. Co. v..... 529
Hunt v. Sharkey, 20 Cal. App. 690.....389, 453
Hunt v. Davis, 135 Cal. 31-34..... 9
Hunt v. Ward, 99 Cal. 614.....376, 399, 400, 402, 405, 410, 411, 412
Huntington, Duke v.....367, 369, 408
Huntington, Washburn v..... 540
Hurlburt v. Arthur, 140 Cal. 103.....330, 369, 372
Hurwitz v. Gross, 5 Cal. App. 614-621..... 504
Hyatt v. Williams, 148 Cal. 585..... 4

PAGE
Hyde, Visalia etc. v.....303, 323, 371, 459, 461, 468, 467
Hyman v. Coleman, 82 Cal. 653.....
.....364, 365, 367, 399, 400, 401, 403, 404, 412

I

Idaho Canal etc. Co., Just v..... 259
Idaho etc., Winston v.....610, 616, 636
Illinois Trust etc. v. Pacific Railway Co., 117 Cal. 344.....
.....101, 111, 166, 194, 278
Imperial Land Co., Cortelyou v., 156 Cal. 373.....107, 114, 180
Imperial Land Co., Cortelyou v., 166 Cal. 14..... 303
Imperial Water Co., Miller v..... 249
In re Application of Bunkers, 1 Cal. App. 61.....11, 509
In re Balfour etc., 14 Cal. App. 261.....264, 523
In re Boston Min. Co., 51 Cal. 624..... 236
In re California Mutual Life Ins. Co., 81 Cal. 368.....364, 367
In re Castle Dome M. etc. Co., 3 Cal. Unrep. 1..... 542
In re Close, 106 Cal. 574..... 584
In re La Societe Francaise etc., 123 Cal. 525.....11, 24, 547
In re Los Angeles Trust Company, 158 Cal. 603.....24, 548
In re Madera etc., 92 Cal. 316..... 11
In re Parrott, 5 Pac. Coast Law Journal 161..... 15
In re Ramazzina, 110 Cal. 488..... 540
In re Solidarite etc., 68 Cal. 392-394..... 207
In re South Mountain etc. Min. Co., 5 Fed. 403..... 497
In re South Mountain etc. Min. Co., 14 Fed. 347..... 497
In re Werner, 129 Cal. 567..... 16
International etc. v. Holmes, 25 Cal. App. 474..... 624
International Harvester etc. v. Kentucky, 234 U. S. 216..... 611
International Text Book Co. v. Pigg, 217 U. S. 91-112..... 620
Interstate Amusement Co. v. Albert, 239 U. S. 500..... 637
In the Matter of College Hill etc., 157 Cal. 596.....12, 525
Irvine, Bacon v..... 255
Irvine v. McKeon, 23 Cal. 474..... 446
Ish, Cumberland College v..... 581
Isom v. Rex Crude Oil Co., 147 Cal. 663..... 142
Ivey v. Kern etc., 115 Cal. 200..... 561

J

Jaccard, Smith v..... 82
Jack, Abbott v.....369, 370
Jack, Goodall v.....403, 412
Jacks, Greenleaf v., 133 Cal. 506.....392, 394
Jacks, Greenleaf v., 135 Cal. 154..... 394
Jacoby, Delano v..... 297

PAGE
Jacques, Ryan v.....391, 398
Jager v. California Bridge Co., 104 Cal. 542..... 561
James, Odd Fellows etc. v..... 291
Jameson v. Simonds Saw. Co., 2 Cal. App. 582.....571, 611
Jaques v. Board Sup. Yuba County, 24 Cal. App. 381.....68, 513
Jefferson v. Hewitt, 95 Cal. 535.....241, 246
Jefferson v. Hewitt, 103 Cal. 624.....110, 241, 246, 286, 424, 587
Jenkins v. California etc., 22 Cal. 538.....29, 559, 626, 627
Jennings v. Bank of California, 79 Cal. 323.....302, 318
Jennings, Niles State Bank v..... 407
J. I. Case Plow Co. v. Montgomery, 115 Cal. 380.....367, 403
J. L. Mott Iron Works v. West Coast etc., 113 Cal. 341..... 572
Johnson, Arnold v..... 338
Johnson v. Bank of Lake, 125 Cal. 6.....376, 407
Johnson, Bank of National City v., 6 Cal. Unrep. 418.....228, 233
Johnson, Bank of National City v., 133 Cal. 185.....
.....228, 229, 395, 463, 476, 477, 496
Johnson v. California etc., 127 Cal. 283..... 139
Johnson, Ede v.....327, 585
Johnson v. Goodyear, 127 Cal. 4.....10, 12
Johnson v. Hinkel, 29 Cal. App. —.....400, 404, 409
Johnson v. Kirby, 65 Cal. 488.....10, 315, 459
Johnson v. Langdon, 135 Cal. 624.....71, 502
Johnson, Lawrence v..... 97
Johnson, Marysville v., 93 Cal. 538, 551.....33, 375, 465, 468, 470
Johnson, Marysville v., 109 Cal. 192..33, 239, 241, 375, 465, 468, 471
Johnson v. Tautphaus, 127 Cal. 606..... 685
Johnson v. Withers, 9 Cal. App. 52..... 422
Johnston v. Tejunga, 25 Cal. App. 84..... 290
Jones v. Allert, 161 Cal. 234..... 605
Jones v. Evans, 6 Cal. App. 88.....279, 583
Jones v. Goldtree etc., 142 Cal. 383.....402, 403, 412
Jones, Pacific Imp. Co. v..... 82
Joost v. Craig, 131 Cal. 504-508..... 580
Joplin, Keech v..... 513
Jordan, Albert Pick & Co. v..... 668
Jordan, Bank of Los Banos v.....20, 41
Jordan, California Telephone etc. v.....40, 49, 126, 726, 729
Jordan, City Properties Co. v.....650, 656
Jordan, Film Producers v..... 31
Jordan, Hartford etc. v..... 671
Jordan, Tidewater etc. v.....125, 221, 759
Jordan, Tognazzini v.....40, 525, 725
Joseph Levy Bag Co., Newhall v.....96, 279, 289
Joshua Hendy Machine Works, Golden Gate Mill etc. Co. v..64, 66
Joshua Hendy etc., Siebe v..... 282
Joyce, Quartz Glass etc. v.....110, 241

PAGE
Jubilee M. Co., Colpe v.....160, 293
Just v. Idaho Canal etc. Co., 16 Ida. 639..... 259

K

Karma-Ajax etc., Bond v..... 567
Kaiser etc. v. Curry, 155 Cal. 652.....11, 514, 518, 582, 668, 670
Katz, Miller & Lux, Inc., v.....368, 400
Kaull, Blanchard v.....65, 294
Kaweah Canal etc., Bliss v.....81, 83, 261, 263, 277, 290
Kaweah Canal, Tulare Irr. Dist. v.....126, 138, 451
Keech v. Joplin, 157 Cal. 1..... 513
Keener v. Eagle Lake etc., 110 Cal. 630..... 571
Kellerman v. Maier, 116 Cal. 416.....107, 113, 255
Kelley v. Ning Yung Assn., 2 Cal. App. 464.....100, 285
Kennedy, California National Bank v..... 98
Kennedy v. California Sav. Bank, 101 Cal. 495.....89, 97, 98
Kennedy v. California Sav. Bank, 97 Cal. 93.....366, 400, 497, 498
Kennedy v. Hibernia Sav. etc., 38 Cal. 151..... 570
Kennedy v. Lee, 147 Cal. 596..... 328
Kennedy, Pekin Min. etc. Co. v..... 139
Kendrick v. Diamond etc., 94 Cal. 137..... 561
Kentucky, International Harvester Co. v..... 611
Kern, Bottle Mining etc. Co. v.....
.....461, 463, 464, 466, 469, 476, 481, 483, 484, 490
Kern etc., Ivey v..... 561
Kern etc., Grocers etc. v.....552, 553, 555, 557, 561, 563, 567, 623
Kern County L. Co., Miller & Lux v., 134 Cal. 586.....
.....550, 551, 554, 560, 561, 563, 564
Kern County L. Co., Miller & Lux v., 140 Cal. 132-137.....
.....550, 552, 553, 554, 560, 563
Kern County L. Co., Miller & Lux v., 7 Cal. Unrep. 9.....552, 554
Kern River etc., Wait v.....308, 311, 318
Kerrigan, Title etc. v..... 24
Keystone etc. Co. v. Superior Court, 138 Cal. 738...541, 543, 621, 625
Kidder, Fletcher v.....336, 337, 339, 505
Kiefhaber L. Co. v. Newport L. Co., 15 Cal. App. 40..... 400
Kimball v. Richardson etc., 111 Cal. 386..... 393
Kimball v. Union Water Co., 44 Cal. 173..... 315
Kinard v. Ward, 21 Cal. App. 85; s. c. 92.....211, 219
King v. Armstrong, 9 Cal. App. 368..... 408
King, Mauer v..... 357
King v. Randlett, 33 Cal. 318..... 572
Kirby, Johnson v 10, 315, 459
Kirchner, Pope v..... 585
Klunker, Locke v..... 537
Koch v. Speedwell etc., 24 Cal. App. 123..... 134

PAGE

Kohl v. Lilienthal, 81 Cal. 385.....
.....9, 133, 210, 248, 257, 436, 437, 440, 447, 525
Kohler v. Agassiz, 99 Cal. 9-15.....240, 246, 468, 473, 497, 498, 544
Kohn v. Sacramento etc., 168 Cal. 1.....340, 380
Knickerbocker T. Co., Cleveland etc. v..... 529
Knowles v. Sandercock, 107 Cal. 629.....
.....89, 364, 365, 366, 367, 388, 389, 394, 404, 505
Krause v. Durbrow, 127 Cal. 681.....188, 323
Krogh v. Pacific etc., 11 Cal. App. 237.....243, 559, 561, 567
Krouse v. Woodward, 110 Cal. 638.....318, 329
Krouse v. Woodward, 5 Cal. Unrep. 230..... 321
Kullman v. Simmens, 104 Cal. 595, 599.....355, 357
Kullman etc. v. Superior Court, 15 Cal. App. 276..... 502
Kutz v. Fleisher, 67 Cal. 93..... 355

L

Labory v. Orphan Asylum, 97 Cal. 274..... 55
Lachmann v. Supreme Council etc., 142 Cal. 29..... 544
Lackenbach v. Finn, 26 Cal. App. 482.....213, 267
Lacy v. Gunn, 144 Cal. 511..... 139
Lady Washington etc. v. Wood, 113 Cal. 489.....163, 278, 450
La Fortuna etc., Ludington v.....561, 629
Lakeport etc., Boggs v.....280, 283, 500
Lakeside Ditch Co. v. Crane, 80 Cal. 185-186.....64, 66
Lake Shore etc. v. Modoc etc., 108 Cal. 261..... 561
Lake Shore etc. v. Modoc Land Co., 130 Cal. 699.....291, 295
Lake View etc., Barrell v.....209, 219, 230, 233, 234
Lake View etc., Pettibone v..... 283
Lamb v. Webb, 151 Cal. 451-454..... 511
Lambourn, Tropico Land etc. Co. v..... 617
Land Co., Abbott v..... 286
Land, Clamp v..... 66
Land (76) etc., People's Ditch Co. v..... 65
Landers, Moyle v., 3 Cal. Unrep. 116.....254, 258, 260
Landers, Moyle v., 83 Cal. 582..... 255
Lane, Miller v.....382, 408, 409
Langdon, Johnson v.....71, 502
Lankershim Ranch etc. v. Herberger, 82 Cal. 600-602.....
.....239, 301, 302, 309, 318, 473, 474
Larrabee v. Baldwin, 35 Cal. 155.....363, 367, 378, 379
La Rue, People v.....65, 77
La Serena etc., Blood v., 134 Cal. 366.....96, 587, 597
La Serena etc., Blood v., 113 Cal. 225..81, 88, 209, 210, 212, 264, 279
La Serena etc., Blood v., 150 Cal. 764.....386, 388, 392
Lassen etc., Porter v.....213, 217, 222, 223
Lathrop, Brewster v..... 438

PAGE
Lauridson, Willis v. ... 217
Law Credit Co. v. Provident etc., 14 Cal. App. 689 ... 148
Lawley, People v. ... 137, 141
Lawrence v. Ballou, 50 Cal. 258 ... 617
Lawrence v. Johnson, 131 Cal. 177 ... 97
Lee, Burne v. ... 443, 447, 448
Lee, Kennedy v. ... 328
Lee v. McClelland, 120 Cal. 147 ... 422
Lee v. Southern Pacific R. R., 116 Cal. 97 ... 515
Leitch v. Marx, 21 Cal. App. 208 ... 265, 285
Leiter, Union Savings Bank v. ... 110, 150, 239, 240, 256 302, 380, 381, 390, 395, 405, 453, 456, 458, 462, 469, 476, 479, 498
Le Mesnager v. Hamilton, 101 Cal. 532-539 ... 580
Lem v. Wilson, 27 Cal. App. 512 ... 329
Lemoore etc. v. McKenna etc., 163 Cal. 736 ... 486
Lemoore etc., Stephens v. ... 213, 482, 485, 486, 490, 493
Lent, Moore v. ... 446
Lenzen, McKiernan v. ... 73, 78, 81, 288, 289
Leonard, People v., 106 Cal. 302-309 ... 34, 67, 416, 430
Leonard, People v., 103 Cal. 200 ... 426
Leopold etc., George Frank Co. v. ... 611
Levee Dist. etc., People v. ... 11
Lewis v. Curry, 156 Cal. 93 ... 514, 670
Lewis v. Dunne, 134 Cal. 291 ... 57
Lewis v. Miller & Lux, 156 Cal. 101 ... 314, 666, 668
Lewis v. Southern Pacific etc., 66 Cal. 209 ... 560, 561, 564
Lewisohn, Old Dominion etc. v. ... 602
Liberty Hill M. Co., Hudepohl v. ... 78
Lilienthal, Kohl v. ... 9, 133, 210, 248, 257, 436, 437, 440, 447, 525
Lincoln Co. Bank v. Fetterman, 170 Cal. 357 ... 584, 637
Linda Vista etc., People v. ... 63, 65
Linder etc. v. Pacific etc., 17 Cal. App. 81 ... 284
Lingle, Nason v. ... 210, 297
Little, Terry v. ... 363
Little Bonanza etc., Atwood v. ... 566
Liverpool etc. Ins. Co., San Francisco v. ... 11, 625
Llewellyn Iron Works v. Albert Kinney Co., 171 Cal. —... 208, 668
Lobree, Sacry v. ... 540
Locke v. Klunker, 123 Cal. 231-235 ... 537
Lockwood, Western States Life etc. v. ... 267, 400
Logan, Hellman v. ... 566
Loma Vista Ranch Co., Riley v. ... 285
Lomita etc. v. Robinson, 154 Cal. 37 ... 598
London etc. Bank, Cowdery v. ... 538
London etc. v. Parrott, 125 Cal. 488 ... 364, 400, 403
Los Angeles Athletic etc. v. Spires, 166 Cal. 173 ... 469
Los Angeles Brewing Co., Freyberg v. ... 266

PAGE
Los Angeles, Canfield v.....308, 642
Los Angeles etc., Citizens' Bank v..... 130
Los Angeles etc. v. Davis, 146 Cal. 179..... 572
Los Angeles etc. Gas Co., Lowe v.....124, 128, 178, 212, 227, 231
Los Angeles Gas Co. v. Toberman, 61 Cal. 200..... 11
Los Angeles etc., Grant v..... 530
Los Angeles Immigration etc., Smith v.....212, 263
Los Angeles v. Los Angeles etc., 152 Cal. 765..... 671
Los Angeles Lighting etc. v. Los Angeles, 106 Cal. 156..... 283
Los Angeles, McFadden v.....149, 161
Los Angeles Elect. Ry., People v.....43, 513, 516
Los Angeles, People v..... 513
Los Angeles Holiness Band v. Spires, 126 Cal. 544..6, 22, 60, 64, 66
Los Angeles v. State Loan & T. Co., 109 Cal. 396-401..... 646
Los Angeles, Western Union Tel. Co..... 644
Los Nietos etc., Strong v..... 22
Louisville etc. Ry. Co., Hancock v..... 193
Louisville Trust Co. v. Louisville etc. R. Co., 174 U. S. 674.... 129
Loup v. California So. Ry., 63 Cal. 97..... 581
Love v. Anchor etc., 5 Cal. Unrep. 425..... 588
Love v. Sierra Nevada etc., 32 Cal. 639..... 295
Loveland v. Garner, 71 Cal. 541..... 679
Lovett, Beeman v..... 284
Low v. Central Pacific, 52 Cal. 59..... 76
Low, McDougald v..... 308
Lowden, People v..... 513
Lowe v. Los Angeles etc. Gas Co., 24 Cal. App. 367.....
.....124, 128, 178, 212, 227, 231
Lowe, Rigby v.....265, 279, 285, 288
Lowe v. Superior Court, 165 Cal. 708.....533, 662, 668
Loewenthal v. Coonan, 135 Cal. 383..... 406
L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423..... 279
Ludington etc. v. La Fortuna etc., 4 Cal. App. 369.....561, 629
Lukens, Pierce v..... 247
Lum v. American Wheel Co., 165 Cal. 657....359, 380, 456, 457, 473
Lundy, Creditors Union etc. v.....60, 65, 634
Lyford, Burnett v.....84, 89, 263
Lynch v. McDonald, 155 Cal. 704.....208, 295, 422
Lynch, Prince v.....367, 380, 388

Mc

MacBean, Royal Trust Co. v.....400, 409
MacDonald v. De Fremery, 168 Cal. 189.....332, 419
McAulay v. Moody, 128 Cal. 202..... 439
McBoyle v. Union etc., 162 Cal. 277..... 89
McCallion v. Hibernia etc. Soc., 70 Cal. 167..... 22

PAGE
McCarthy Co. v. Boothe, 2 Cal. App. 170..... 578
McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328-338.....158, 299
McCarthy Co., Witter v..... 588
McClelland, Lee v..... 422
McCollough, Faymonville v..... 365
McCormick v. Stockton, 130 Cal. 100.....78, 282, 294
McCullah, Reclamation etc. v..... 158
McCullough, Briggs v..... 27
McCully v. Cooper, 114 Cal. 262.....310, 311
McDermont v. Anaheim etc., 124 Cal. 115.....38, 257, 346
McDonald v. California etc., 151 Cal. 159.....561, 567
McDonald, Dundon v..... 276
McDonald, Lynch v.....208, 295, 422
McDonald, McGowan v.....18, 362, 365, 366, 388, 400, 455
McDougald v. Low, 164 Cal. 107..... 308
McFadden v. Los Angeles, 74 Cal. 571-574.....149, 161
McFall v. Buckeye etc., 122 Cal. 470.....322, 343
McGowan v. McDonald, 111 Cal. 57-66..18, 362, 365, 366, 388, 400, 455
McGregor, Harris v.....21, 28, 198
McKee v. Cunningham, 2 Cal. App. 684.....81, 500
McKee v. Title Ins. Co., 159 Cal. 206.....
.....110, 115, 123, 124, 125, 377, 410, 541, 609
McKendrick v. Western Zinc etc., 165 Cal. 24..... 571
McKenna etc., Lemoore etc. v..... 486
McKeon, Irvine v..... 446
McKenzie, Boston Tunnel Co. v..... 60
McKiernan v. Lenzen, 56 Cal. 63.....73, 78, 81, 288, 289
McKillican, Bishop v..... 538
McKoon, Savings & Loan v.....55, 56
McLane v. Placerville etc. R. R., 66 Cal. 606..... 538
McLean, People v..... 429
McPhee v. Reclamation Dist., 161 Cal. 566.....65, 454
McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315.....
.....78, 87, 97, 265, 267
McShane v. Carter, 80 Cal. 310..... 139
McSherry v. Pennsylvania etc., 97 Cal. 637.....559, 561, 626
McTigue v. Arctic Ice etc., 20 Cal. App. 708.....88, 140

M

Maas, Deming v..... 208
Mabury, Winchester v..... 417
Mackay, Fox v..... 370
Madden, Modoc (County of) v..... 394
Madison, Bank of British etc. v..... 608
Magee v. Mokelumne, 5 Cal. 258..... 104
Magee v. Pacific Imp. Co., 98 Cal. 678..... 97

PAGE
Maginness, Granite etc. v.....77, 86, 139
Magnolia etc., Griffin v.....388, 561, 567
Mahlman, People v..... 431
Mahon v. San Rafael etc., 49 Cal. 269.....572, 581
Mahoney etc., Stewart v..... 185
Maier, Kellerman v.....107, 113, 255
Main v. Casserly, 67 Cal. 128..... 96
Major v. Walker, 23 Cal. App. 465..... 417
Malloye v. Coubrough, 96 Cal. 649..... 580
Malone v. Crescent City etc., 77 Cal. 42..... 583
Manhattan etc., Provident etc. v.....239, 240
Mansfield, Vaca Valley etc. v..... 81
Mansfield G. M. Co., Hawkins v..... 256
Manning v. App etc., 171 Cal. —.....140, 215, 334, 335, 374, 577
Mapes, Ward Land Co. v.....55, 623
Marcuse, Blood v..... 285
Mark v. Superior Court, 129 Cal. 1..... 203
Market St. Ry. Co. v. Hellman, 109 Cal. 586....11, 53, 67, 77, 87, 89, 121, 133, 135, 140, 149, 155, 184, 186, 189, 191, 193, 371, 488
Markham, Turner v.....115, 248, 250, 256
Marks v. Evans, 5 Cal. Unrep. 505, 62 Pac. 76.....163, 330, 450
Marsh, Fites v..... 446
Marshall v. Wentz, 28 Cal. App. 540.....366, 498
Marten v. Paul O. Burns Wine Co., 99 Cal. 355..... 242
Martenstein, Bragg v..... 344
Martin v. Deetz, 102 Cal. 64.....28, 52, 60, 63, 64, 68, 516, 582
Martin, Smith v.....112, 302
Martin v. Zellerbach, 38 Cal. 300..... .....134, 214, 278, 436, 439, 440, 442, 447, 451
Marx v. Raley & Co., 6 Cal. App. 479..... 584
Marysville etc. v. Johnson, 93 Cal. 538-551....33, 375, 465, 468, 470
Marysville etc. v. Johnson, 109 Cal. 192..... .....33, 239, 241, 375, 465, 468, 471
Matthiessen, Thomas v., 192 Fed. 495..... 383
Matthiessen, Thomas v., 232 U. S. 221.....383, 609
Maurer v. King, 127 Cal. 114, 118..... 357
Maynard v. Fireman's Fund etc., 34 Cal. 48.....207, 290
Maze, Burke v.....387, 389, 453
Meadow Valley etc., Sherwood v.....303, 339
Meigs, Harvey v.....254, 258, 259
Meister etc. v. Wood & Tatum Co., 26 Cal. App. 584..... 286
Melone v. Ruffino, 129 Cal. 514..... 294
Merced etc. v. Curry, 157 Cal. 727.....122, 450, 757, 764
Merced etc., Walter v.....386, 392, 465
Merced, San Joaquin etc. v..... 9
Merchants' etc. v. Davidson, 23 Cal. App. 274.....113, 257, 387, 391
Merchants' etc. v. Escondido etc., 144 Cal. 329..... 16

PAGE
Metropolitan Church Assn., Holiness Church v..... 613
Merrill, Brown v.....367, 388, 390
Merrill, Montgomery v..... 537
Merrill, San Bernardino Co. v.....462, 464, 483, 484, 490, 497
Merritt, People v..... 421
Meuli, Carter v..... 138
Mexican etc., Tapscott v.....441, 447, 448
Michigan etc., Bloom v..... 559
Middleton v. Arastraville etc., 146 Cal. 219-222.....
.....31, 126, 176, 248, 256, 270, 501, 506
Miles v. Woodward, 115 Cal. 314.....606, 608, 679
Miller v. Imperial Water Co., 156 Cal. 27..... 249
Miller, San Francisco Co. Agency v..... 365
Miller v. Lane, 160 Cal. 90.....382, 408, 409
Miller & Lux, Baldwin v.....9, 76, 438, 441, 447, 448
Miller & Lux, Inc., v. Katz, 10 Cal. App. 576.....368, 400
Miller & Lux v. Kern etc., 134 Cal. 586.....
.....550, 551, 554, 560, 561, 563, 564
Miller & Lux v. Kern etc., 140 Cal. 132-137.....
.....550, 552, 553, 554, 560, 563
Miller & Lux v. Kern etc., 7 Cal. Unrep. 9.....552, 554
Miller & Lux, Lewis v.....314, 666, 668
Mills v. Boyle etc., 132 Cal. 95.....81, 84, 230, 234, 265, 279
Miners' Ditch Co. v. Zellerbach, 37 Cal. 588.....81, 88, 93, 136
Mines, Wall v.....49, 60, 63, 67, 87, 520
Missouri, Kansas & Texas Oil Co., Raisch v.....228, 463, 487
Mitchell v. Beckman, 64 Cal. 117-121.....35, 97, 301, 364, 401, 474
Modesto Bank v. Owens, 121 Cal. 223..... 538
Modoc etc., Lake Shore etc. v., 108 Cal. 261..... 561
Modoc Land Co., Lake Shore etc. v., 130 Cal. 699.....291, 295
Modoc (County of) v. Madden, 136 Cal. 134..... 394
Modoc etc., Bowers v..... 561
Mokelumne, Magee v..... 104
Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265.....
.....21, 59, 364, 367
Mono etc. Mining Co., Graves v.....158, 213, 218, 303, 325
Montecito Creek Water Co., Hildreth v..... 346
Montecito W. Co., People v.....49, 63, 65, 69, 519, 520
Montecito etc. v. Santa Barbara, 144 Cal. 594.....86, 280, 587
Monte Cristo, Scott v..... 266
Monterey etc. v. Hildreth, 53 Cal. 123.....33, 238, 374, 465, 471
Montgomery, J. I. Case Plow Co. v.....367, 403
Montgomery v. Merrill, 65 Cal. 432..... 537
Moody, McAulay v..... 439
Moore v. Boyd, 74 Cal. 171.....322, 366, 367, 370, 399, 400, 412
Moore v. Lent, 81 Cal. 502..... 446
Mora v. Murphy, 83 Cal. 17..... 54

PAGE
Moran v. Ross, 79 Cal. 164..... 5
Morey, Rozecrans v.....34, 203, 211, 274
Morgan v. Board of Education, 136 Cal. 247..... 100
Morgan's etc. S. S. Co. v. Texas etc. Co., 137 U. S. 171..... 130
Morgrage v. National Bank etc., 24 Cal. App. 103..... 342
Morrisey, Turney v..... 672
Morrison v. Gold Mountain M. Co., 52 Cal. 307.....256, 317
Morrison v. Stone, 103 Cal. 94-97..... 255
Morrow v. Superior etc., 64 Cal. 383.....364, 365
Morse, Smith v..... 79
Moss v. Smith, 172 Cal. —.....377, 446, 448
Mount Shasta etc., People v.....23, 520
Moyle v. Landers, 3 Cal. Unrep. 116.....254, 258, 260
Moyle v. Landers, 83 Cal. 582..... 255
Moynihan v. Drobaz, 124 Cal. 212..... 572
Mt. Tecarte L. & W. Co., McCarthy v.....158, 299
Mulford, H. K. Co. v. Curry, 163 Cal. 270.....
.....634, 650, 651, 666, 667, 668
Mudgett v. Horrell, 33 Cal. 25..... 372
Muir, Robinson v..... 444
Mulligan v. Smith, 59 Cal. 225.....207, 290
Munroe v. Thomas, 5 Cal. 470..... 141
Murfey, Oakland Bank etc. v..... 580
Murphy v. Crouse, 135 Cal. 14-19.....308, 310, 311
Murphy, Mora v..... 54
Murphy v. Pacific Bank, 119 Cal. 334-341..... 646
Murphy v. Pacific Bank, 130 Cal. 542-550..... 149
Murphy, Union Water Co. v.....74, 86
Murray, Goldman v..... 223
Murray v. Superior Court, 129 Cal. 628-632.....530, 534
Murry, Curtiss v..... 80
Mutual etc. v. Ashworth, 118 Cal. 5..... 10
Myers v. Chittyna etc., 20 Cal. App. 418..... 494
Myers v. Sierra etc., 122 Cal. 672.....374, 379

N

Napa etc. v. Dasso, 153 Cal. 703..... 11
Nash v. Rosesteel, 7 Cal. App. 504..... 422
Nason v. Lingle, 143 Cal. 363-366.....210, 297
Nawa, Anderson v..... 364
National Bank etc., Morgrage v..... 342
National Bank of California, Fowles v.....328, 342, 347
National Carriage etc. Co. v. Story, 111 Cal. 531-7.....313, 399
National Electric etc., Brown v..... 287
National Homestead Assn., Rideout v....112, 209, 220, 279, 382, 605

PAGE

National Parafine Oil Co. v. Chappellet, 4 Cal. App. 507.....462, 484, 489, 497
Natoma etc. v. Clarkin, 14 Cal. 552-3..... 86
Natoma W. & M. Co., Strout v..... 328
Navajo etc. v. Curry, 147 Cal. 582.....108, 122, 124, 125, 749
Neall v. Hill, 16 Cal. 146-150.....159, 200, 237, 518
Nellis v. Pacific Bank, 127 Cal. 166..... 403
Nelson, Happy Valley etc. Co. v..... 73
Nelson, Pinney v.....382, 383, 609
Neilson v. Crawford, 52 Cal. 248..... 388
Nesbitt, Spangenberg v..... 314
Neuhart v. Geo. K. Porter Co., 23 Cal. App. 526..... 290
Nevada Bank, Borland v..... 372
Nevada Bank, Spreckels v.....322, 335, 374, 577
Newbegin, Newton etc. v..... 243
Newhall v. Joseph Levy Bag Co., 19 Cal. App. 9.....96, 279, 289
Newhall v. Western Zinc Co., 164 Cal. 380.....259, 533, 668
New Orleans etc. Ry. Co. v. Parker, 143 U. S. 42, 59-60..129, 130, 131
Newport L. Co., Kiefhaber L. Co. v..... 400
New Standard etc., Young v..... 336
Newton etc. v. Newbegin, 74 Fed. 135, 33 L. R. A. 727..... 243
New York Life Ins. Co., Griffith v..... 102
New York, Horn etc. v..... 9
Niccolls v. Rice, 147 Cal. 640..... 418
Nicholas, Wickersham Banking Co. v..... 289
Nicholson v. Auburn etc., 6 Cal. App. 548..... 55
Nicholson v. Randall Banking Co., 130 Cal. 533..... 288
Nicholls v. Reid, 109 Cal. 630-632..... 325
Niles State Bank v. Jennings, 22 Cal. App. 66..... 407
Ning Yung Assn., Kelley v.....100, 285
Nisbet v. Clio Mining Co., 2 Cal. App. 436..... 145
Nixon v. Goodwin, 3 Cal. App. 358.....267, 541
Noble v. Garden, 146 Cal. 225..... 345
Noee, Peck v.....383, 609
North America etc., Yuba Co. v.....561, 568
North Star etc., Taylor v.....100, 459
Northwestern etc. v. Whitney, 5 Cal. App. 105.....261, 263, 290

O

Oakland v. Carpentier, 13 Cal. 546..... 4
Oakland Bank of Savings, Brittan v.....325, 342
Oakland Bank etc. v. Murfey, 68 Cal. 455..... 580
Oakland Pav. Co. v. Rier, 52 Cal. 270..... 281
Oakland Paving Co. v. Tompkins, 72 Cal. 5.....343
Oakland R. R. v. Oakland etc., 45 Cal. 365.....62, 518
Oakland, People v..... 512

PAGE
O'Bear, Rutz v. ... 208
O'Brien v. Big Casino etc., 9 Cal. App. 283 ... 617
O'Brien v. Shaw's Flat etc., 10 Cal. 343 ... 570
Ocean Shore etc., Hammond v. ... 564
O'Connor v. Witherby, 111 Cal. 530 ... 369
Odd Fellows etc. v. James, 63 Cal. 598 ... 291
O'Dea v. Hollywood etc. Assn., 154 Cal. 53 ...
..110, 157, 302, 303, 304, 381, 454, 462, 465, 467, 469, 472, 477, 485
Odell v. Cox, 151 Cal. 70 ... 576
Old Dominion etc. v. Lewisohn, 210 U. S. 206 ... 602
Oldham, People v. ... 64
Old Home Mining Co., Schnittger v. ...212, 222, 223, 269
Old Settlers etc. v. White, 158 Cal. 236 ...284, 538
Olender v. Crystalline M. Co., 149 Cal. 482 ... 613
Oliphant, Cutting v. ... 408
Oliphant, Sferlazzo v. ...225, 230, 262, 277
Oliver, Union Collection Co. v. ...263, 446
O'Neill v. Donahue, 57 Cal. 226 ... 325
O'Neill v. Quarnstrom, 6 Cal. App. 469-472 ...267, 400, 403
Ontario etc. v. Tibbitts, 80 Cal. 69 ...55, 583, 624
Orchard Crude Oil Co., Donaldson v. ... 284
Original Empire etc., Granger v. ...232, 233, 496
Oroville etc. v. Plumas County, 37 Cal. 361 ...11, 59, 60, 68
Oroville etc., Ewing v. ... 108
Oroville G. & M. Co., Wright v. ...254, 415
Orphan Asylum, Labory v. ... 55
Osborne v. Home Life Ins. Co., 123 Cal. 610 ... 102
Otis, Parker v. ...356, 357
Owens, Modesto Bank v. ... 538

P

Pacific Bank v. De Ro, 37 Cal. 538 ...28, 64
Pacific etc., Bank etc. v. ...399, 400, 402, 411
Pacific Bank, Murphy v., 119 Cal. 334-341 ... 646
Pacific Bank, Murphy v., 130 Cal. 542-550 ... 149
Pacific Bank, Nellis v. ... 403
Pacific Bank, Sacramento Bank v. ...365, 386, 393
Pacific Bank v. Stone, 121 Cal. 202-208 ...209, 265, 266, 288
Pacific Beach R. R., San Diego v. ...163, 168, 215, 278, 450
Pacific Can Co., Fontana v. ...81, 264
Pacific Coast etc., Gavin v. ...71, 502
Pacific Coast etc., Waldeck & Co. v. ... 614
Pacific Fruit etc. v. Coon, 107 Cal. 452 ...
...35, 242, 301, 474, 476, 477, 497, 506
Pacific etc., Dulin v. ... 203
Pacific Imp. Co. v. Jones, 164 Cal. 260 ... 82

PAGE
Pacific Trust Co. v. Dorsey, 72 Cal. 55.....110, 424
Pacific etc., Garretson v.....35, 113, 255, 257, 301, 397
Pacific Ry. v. Wade, 91 Cal. 449..... 544
Pacific Ry. Co., Russell v..... 382
Pacific Ry. Co., Illinois Trust etc. v.....101, 111, 166, 194, 278
Pacific etc., Krogh v.....243, 559, 561, 567
Pacific etc., Linder etc. v..... 284
Pacific etc., Ryan v..... 158
Pacific Imp. Co., Magee v..... 97
Pacific States etc., Hobson v.....530, 534
Pacific Vinegar Works v. Smith, 152 Cal. 507..... 282
Pacific Vinegar Works v. Smith, 145 Cal. 364.....
.....212, 216, 218, 271, 274, 275
Pacific Woolgrowing Co., Chamberlain v.....223, 281, 294
Pacific Yacht Club v. Sausalito etc., 98 Cal. 487..... 554
Packers' etc., Cutting Packing Co. v.....364, 404
Page, Harmon v.....362, 368, 386, 391, 497
Palmer, Fritts v..... 636
Palmer, People v..... 426
Paradise etc., Aisbett v..... 564
Parker, New Orleans etc. Ry. Co. v.....129, 130, 131
Parker v. Otis, 130 Cal. 322.....356, 357
Parrott v. Byers, 40 Cal. 615-624.....66, 254, 257
Parrott, London etc. v.....364, 400, 403
Partridge v. Butler, 113 Cal. 326..... 403
Pasadena Land etc., Graham v..... 88
Pasadena etc., South Pasadena v.....137, 140
Pattee, San Francisco Co. Water Co. v..... 274
Pauly v. Pauly, 107 Cal. 8.....92, 100, 215, 224, 261, 270, 284
Paxton, Potts v.....317, 358
Paymaster M. Co., Blanc v.....134, 571, 576
Payne v. Elliott, 54 Cal. 339.....309, 334
Peck v. Noee, 154 Cal. 351.....383, 609
Peek v. Steinberg, 163 Cal. 127.....284, 604
Pekin Min. etc. Co. v. Kennedy, 81 Cal. 356..... 139
Pelton v. San Jacinto etc., 113 Cal. 25..... 368
Pennig, First National Bank v..... 66
Pennington v. Pennington, 19 Cal. App. 519..... 233
Pennington v. Pennington, 170 Cal. 115..... 233
Pennock v. Coe, 64 U. S. 117..... 129
Pennsylvania etc., Bonner etc. v.....285, 298
Pennsylvania etc., McSherry v.....559, 561, 626
People v. Auburn etc., 122 Cal. 335.....44, 58
People v. Bagley, 85 Cal. 343..... 11
People v. Bogart, 45 Cal. 73..... 514
People v. California Safe etc., 18 Cal. App. 732.....314, 666
People v. California Safe etc., 19 Cal. App. 414..... 243

PAGE
People v. Trustees California College, 38 Cal. 166.....87, 88
People v. Central Pac. R. R., 83 Cal. 413.....10, 11, 581
People v. Crockett, 9 Cal. 112.....150, 313
People v. Dole, 122 Cal. 486-497..... 65
People v. Dashaway Assn., 84 Cal. 114-119..5, 510, 511, 512, 515, 518
People v. DeLay, 80 Cal. 52..... 429
People v. Duncan, 41 Cal. 511.....138, 141
People v. Flint, 64 Cal. 49.....34, 519
People v. Frank, 28 Cal. 507-519..... 64
People v. Gunn, 85 Cal. 244.....69, 519
People v. Golden Gate Lodge, 128 Cal. 263.....49, 52, 520
People v. Hibernia etc. Soc., 72 Cal. 21-23..... 507
People v. Hill, 16 Cal. 113..... 191
People v. La Rue, 67 Cal. 531.....65, 77
People v. Lawley, 17 Cal. App. 331.....137, 141
People v. Leonard, 106 Cal. 302-309.....34, 67, 416, 430
People v. Leonard, 103 Cal. 200..... 426
People v. Levee Dist. etc., 131 Cal. 30..... 11
People v. Linda Vista etc., 128 Cal. 484.....63, 65
People v. Los Angeles Elect. Ry., 91 Cal. 340.....43, 513, 516
People v. Los Angeles, 133 Cal. 338..... 513
People v. Lowden, 2 Cal. Unrep. 567, 8 Pac. 66..... 513
People v. Mahlman, 82 Cal. 585..... 431
People v. McLean, 135 Cal. 306..... 429
People v. Merritt, 18 Cal. App. 58..... 421
People v. Montecito W. Co., 97 Cal. 276.....49, 63, 65, 69, 519, 520
People v. Mount Shasta etc., 107 Cal. 256.....23, 520
People v. Oldham, 111 Cal. 651..... 64
People v. Oakland, 123 Cal. 145..... 512
People v. Palmer, 53 Cal. 615..... 426
People v. Perris Irr. Dist., 132 Cal. 289..... 519
People v. Pittsburgh etc., 53 Cal. 695..... 515
People v. Reclamation etc., 53 Cal. 346..... 514
People v. Reclamation, 130 Cal. 613..... 68
People v. Reclamation Dist., 117 Cal. 121.....16, 518
People v. Riverside, 66 Cal. 288..... 519
People v. Robinson, 64 Cal. 373-375.....187, 323
People v. Rosenstein etc., 131 Cal. 153...63, 460, 504, 510, 514, 516
People v. Royce, 106 Cal. 173-189.....429, 430
People v. San Joaquin etc., 151 Cal. 797..... 16
People v. San Francisco Savings Union, 72 Cal. 199.....434, 440
People v. San Francisco Stock Exch., 4 Cal. Unrep. 85, 33 Pac. 785..... 515
People v. Selfridge, 52 Cal. 331..... 9
People v. Sierra Buttes etc., 39 Cal. 514..... 146
People v. Stanford, 77 Cal. 371.....9, 11, 69, 79, 513, 518, 520, 582
People v. Stockton etc., 45 Cal. 306.....63, 110

PAGE
People v. Stockton Savings etc., 133 Cal. 611.....85, 514
People v. Superior Court, 114 Cal. 466-470..... 512
People's Bank v. Superior Court, 104 Cal. 649.....150, 155, 189
People v. Sutter St. Ry., 129 Cal. 545..... 512
People v. Sutter St. Ry. Co., 117 Cal. 604-612.....511, 513
People v. Volcano, 100 Cal. 87.....63, 513
People v. Westlake, 124 Cal. 452-455..... 431
People v. Ward, 134 Cal. 301..... 430
People v. Youtz, 26 Cal. App. 440..... 420
People's Ditch Co. v. 76 Land etc., 5 Cal. Unrep. 292, 44 Pac. 176. 65
People's Home Sav. Bank v. Rauer, 2 Cal. App. 445.....
.....372, 389, 461, 476, 483
People's Home Sav. Bank v. Rickard, 139 Cal. 285..... 399
People's Home Sav. Bank v. Sadler, 1 Cal. App. 189.....
.....151, 152, 303, 399, 462, 474, 476
People's Home etc. v. Stadtmuller, 150 Cal. 106....323, 375, 463, 467
People's Savings Bank v. Superior Court, 103 Cal. 27-34..... 531
Perkins v. Cowles, 157 Cal. 625.....303, 304, 387, 389, 453, 467
Perkins v. Fish, 121 Cal. 317-325..... 416
Perris Irr. Dist., People v..... 519
Petaluma etc., Sims v., 131 Cal. 656.....215, 415
Petaluma etc., Sims v., 6 Cal. Unrep. 540.....215, 415
Pettibone v. Lake View etc., 134 Cal. 227..... 283
Pettit v. Forsyth, 15 Cal. App. 149.....464, 475
Pforr, Barney v.....81, 264
Pharis, San Jose etc. v..... 404
Philadelphia etc., Carey v..... 288
Phillips v. Sanger Lumber Co., 130 Cal. 431.....270, 279
Pierce, Excelsior Water etc. v.....434, 436, 440, 460
Pierce v. Lukens, 144 Cal. 397..... 247
Pierce v. Southern Pacific Co., 120 Cal. 156-163.....616, 617
Pigg, International Text Book Co. v..... 620
Pinney v. Nelson, 183 U. S. 144.....382, 383, 609
Pioneer Mg. Co., Bean v..... 294
Pittman v. Carstenbrook, 11 Cal. App. 224.....561, 568, 628
Pittsburgh Oil Co., Dover v..... 342
Pittsburgh etc., People v..... 515
Pixley v. Western Pac. R. R., 33 Cal. 183..... 280
Placerville etc. R. R., McLane v..... 538
Placerville etc., Thomas v.....28, 610, 626, 629
Plumas County, Oroville etc. v.....11, 59, 60, 68
Plumas County, Welsh v..... 21
Pollitz v. Wickersham, 150 Cal. 238..... 357
Poor v. Yarnell, 28 Cal. App. 714..... 502
Pope v. Kirchner, 77 Cal. 152..... 585
Porter etc., Bergtholdt v..... 388
Porter v. Lassen etc., 127 Cal. 261.....213, 217, 222, 223

PAGE
Postal etc., Altpeter v. ... 581
Postal etc. v. Superior Court, 22 Cal. App. 770 ... 539
Potomac Oil Co. v. Dye, 10 Cal. App. 534 ... 204, 607
Potomac Oil Co. v. Dye, 14 Cal. App. 674 .. 177, 178, 204, 284, 607, 625
Potter v. Dear, 95 Cal. 578 ... 386
Potts v. Paxton, 171 Cal. — ... 317, 358
Potts Drug Co. v. Benedict, 156 Cal. 322 ... 81
Presidio etc., Tafft v., 3 Cal. Unrep. 152 ... 315, 326
Presidio etc., Tafft v., 84 Cal. 131-137 ... 326
Presidio etc., Quay v. ... 326, 343
Preston v. Central California etc., 11 Cal. App. 190 ... 288
Prince v. Lynch, 38 Cal. 528 ... 367, 380, 388
Provident etc., Law Credit Co. v. ... 148
Provident etc. v. Manhattan etc., 168 Cal. 304 ... 239, 240
Purcell, Southern Pacific etc. v. ... 55, 583
Purser v. Eagle Lake etc., 111 Cal. 139 ... 83

Q

Quarnstrom, O'Neill v. ... 367, 400, 403
Quartz Glass etc. v. Joyce, 27 Cal. App. 523 ... 110, 241
Quartz Rock, Aiken v. ... 570
Quay v. Presidio etc., 82 Cal. 1 ... 326, 343
Quincy etc. R. R. Co. v. Humphreys, 145 U. S. 82 ... 529

R

Rains v. Diamond Match Co., 171 Cal. — ... 629
Raisch v. M. K. & T. Oil Co., 7 Cal. App. 668 ... 228, 463, 487
Raley & Co., Marx v. ... 584
Ralston v. Bank of California, 112 Cal. 208-214 ... 90, 126, 313, 315, 318, 319, 451
Ramboz v. Stansbury, 13 Cal. App. 649 ... 82, 329
Randall Banking Co., Nicholson v. ... 288
Randlett, King v. ... 572
Rankin, Davidson v. ... 364
Raphael Weill & Co. v. Crittenden, 139 Cal. 488 ... 66
Rauer, People's Home Savings Bank v. ... 372, 389, 461, 476, 483
Rawhide etc. Zany v. ... 584, 588
Ray v. Borgfeldt, 169 Cal. 253 ... 289
Ray Mfg. Co., Cook v. ... 550, 555, 562, 563, 564
Read v. Buffman, 79 Cal. 77 ... 285
Real Estate Associates v. Superior Court, 60 Cal. 223 ... 537
Reclamation Dist. v. Birks, 159 Cal. 237 ... 215
Reclamation Dist. v. Burger, 122 Cal. 442 ... 454
Reclamation Dist. v. Hagar, 66 Cal. 56 ... 149
Reclamation etc. v. McCullah, 124 Cal. 175-183 ... 158

PAGE
Reclamation Dist. v. McPhee, 13 Cal. App. 382.....69, 454, 513
Reclamation etc., People v..... 514
Reclamation, People v..... 68
Reclamation Dist., People v.....16, 518
Reclamation Dist. v. Sacramento, 134 Cal. 477..... 16
Red Cloud etc., Bennett v..... 139
Redington v. Cornwell, 90 Cal. 49-63.....379, 401, 402, 403
Reed v. Goldstein, 53 Cal. 296..... 544
Reed & Co. v. Harshall, 12 Cal. App. 697-703.....614, 672
Reed etc., Vallejo etc. v., 169 Cal. 545.....15, 26, 65
Reed etc., Vallejo etc. v., 18 Cal. App. Dec. 235-245..... 26
Reid v. Clay, 134 Cal. 213..... 84
Reid etc., Cross v..... 328
Reid, Nicholls v..... 325
Relley v. Campbell, 134 Cal. 175.....207, 208, 233
Remillard Brick Co., Horton v.....159, 298
Reward Oil Co., Waratah Oil Co. v.....139, 232, 279
Rex Crude Oil Co., Isom v..... 142
Reynolds, San Pedro etc. v.....287, 292, 388, 418
Rice, Niccolls v..... 418
Rich v. Edison etc., 18 Cal. App. 354..... 266
Richardson v. Chicago Packing Co., 6 Cal. Unrep. 606..... 394
Richardson etc., Kimball v..... 393
Richardson v. Scott River etc., 22 Cal. 150.....82, 83, 295
Richey v. East Redlands etc., 141 Cal. 227.....22, 466
Richter v. Henningsan, 110 Cal. 530..... 248
Rickard, People's Home Sav. Bank v..... 399
Rideout v. National Homestead Assn., 14 Cal. App. 349.....
.....112, 209, 220, 279, 382, 605
Rier, Oakland Pav. Co. v..... 281
Rigby v. Lowe, 125 Cal. 613.....265, 279, 285, 288
Riley v. Loma Vista Ranch Co., 1 Cal. App. 488..... 285
Rinaldo, Union Savings Bank v.....228, 453, 480
Riordan, Grieg v.....265, 279, 288
Risdon etc. v. Citizens etc., 122 Cal. 97.....9, 141
Riverside, People v..... 519
Riverdale etc. v. Wicks, 14 Cal. App. 526.....55, 56
Robinett, Chandler v..... 285
Robinson v. Blood, 151 Cal. 504.....64, 211, 219, 230, 365, 454, 517
Robinson, Lomita etc. v..... 598
Robinson v. Muir, 151 Cal. 118..... 444
Robinson, People v.....187, 323
Robinson v. Spaulding Gold & Silver M. Co., 72 Cal. 32..... 488
Robinson, Streeten v.....265, 289
Robinson v. Templar Lodge, 117 Cal. 370.....164, 166
Robinson v. Williams, 12 Cal. App. 515.....554, 561
Rock Creek etc., Davis v.....212, 216, 275

PAGE
Roebling's Sons v. Butler, 112 Cal. 677.....365, 367
Rogers, Donohoe v..... 555
Rogers, Hayward v.....328, 330
Roman Catholic Archbishop v. Shipman, 79 Cal. 288.....83, 151
Rondell v. Fay, 32 Cal. 354..... 67
Roos Bros., Collom v..... 216
Root, Cashman v..... 356
Rosa, South Yuba v.....54, 583, 624
Rosborough v. Shasta River Canal, 22 Cal. 556-562..... 159
Rosenbaum, Young v.....365, 403
Rosenstein etc., People v.....63, 460, 504, 510, 514, 516
Rosenthal, Tatum v.....368, 388, 391
Rosesteel, Nash v..... 422
Ross, Moran v..... 5
Rozecrans etc. v. Morey, 111 Cal. 114-116.....34, 203, 211, 274
Rowe v. Table Mt. etc., 10 Cal. 441..... 571
Royal Trust Co. v. MacBean, 168 Cal. 642.....400, 409
Royce, People v.....429, 430
Royer, Gardiner v.....402, 412, 413
Ruck v. Caledonia etc., 6 Cal. App. 360.....462, 479
Rued v. Cooper, 119 Cal. 463..... 357
Ruffino, Melone v..... 294
Russell, California So. Hotel v..... 243
Russell v. Pacific Ry. Co., 113 Cal. 258..... 382
Russell v. Sebastian, 233 U. S. 195..... 14
Ruth v. O'Bear, 15 Cal. App. 436..... 208
Ryan v. Jacques, 103 Cal. 280.....391, 398
Ryan v. Pacific etc., 6 Cal. Unrep. 902, 68 Pac. 498..... 158
Ryatt, Southern Pacific Co. v..... 142
Ryland v. Commercial etc., 127 Cal. 525..... 405

S

Sacramento etc., Kohn v.....340, 380
Sacramento etc., Gallup v.....558, 559, 627
Sacramento v. Southern Pacific R. R., 127 Cal. 217..... 78
Sacramento Bank, Copsey v..... 213
Sacramento Bank v. Pacific Bank, 124 Cal. 150.....365, 386, 393
Sacramento, Reclamation Dist. v..... 16
Sacry v. Lobree, 84 Cal. 41..... 540
Sadler, People's Home Sav. Bank v..151, 152, 303, 399, 462, 474, 476
Salamanca etc., Holmes v..... 582
Salfield v. Sutter Co. etc., 94 Cal. 546.....209, 210, 217, 224, 261, 277, 280, 297
Salmon etc., Curtin v., 130 Cal. 348..211, 212, 217, 223, 224, 232, 385
Salmon etc., Curtin v., 141 Cal. 308.....88, 166, 209, 214, 278, 297, 385, 588

PAGE
Salvatore Quartararo, Coghlan v. ... 265
San Bernardino Co. v. Merrill, 108 Cal. 493 ... 462, 464, 483, 484, 490, 497
San Buenaventura v. Vassault, 50 Cal. 534 ... 178
Sandercock, Knowles v. ... 89, 364, 365, 366, 367, 388, 389, 394, 404, 505
San Diego v. Pacific Beach R. R., 112 Cal. 53-62, 64 ... 163, 168, 215, 278, 450
San Diego Gas Co. v. Frame, 148 Cal. 252 ... 54
San Diego Gas Co. v. Frame, 137 Cal. 444 ... 52, 60, 64, 87, 517, 572
San Diego S. P. R. R., Foulke v. ... 92
San Diego Water Co. v. San Diego, 59 Cal. 517 ... 102
San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549 ... 78
San Francisco, Argenti v. ... 77
San Francisco, Bank of California v. ... 5, 9, 644
San Francisco etc. v. Bee, 48 Cal. 398 ... 134, 447
San Francisco, Berry v. ... 290
San Francisco etc., Brown v., 58 Cal. 426 ... 310, 348
San Francisco etc., Brown v., 122 Cal. 648 ... 561
San Francisco etc., Burnham v. ... 484, 490, 491, 502, 514
San Francisco etc., Chater v. ... 5
San Francisco, Chesebrough v. ... 642, 644
San Francisco, Dewitt v. ... 74, 86
San Francisco, Dunbar v. ... 79
San Francisco National Bank v. Dodge, 197 U. S. 70 ... 644
San Francisco etc., Fraser v. ... 266
San Francisco Sugar Co., Harris v. ... 438
San Francisco, Herzo v. ... 101
San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113 ... 11, 625
San Francisco Co. Agency v. Miller, 4 Cal. App. 291 ... 365
San Francisco Savings Union, People v. ... 434, 440
San Francisco Stock Exchange, People v. ... 515
San Francisco v. Spring Valley etc., 48 Cal. 493 ... 134
San Francisco Gas Co. v. San Francisco, 9 Cal. 452 ... 92, 99
San Francisco Co. Water Co. v. Pattee, 86 Cal. 623 ... 274
San Francisco & N. P. Ry. Co., Smith v. ... 155, 180, 185, 186, 187, 189, 191, 323, 371
San Francisco Musical Fund Society, Stohr v. ... 166
San Francisco etc., Waymire v. ... 80, 254
San Francisco, Zottman v. ... 78
San Gabriel etc., Brown v. ... 381, 458
San Gabriel Valley etc. v. Dennis, 4 Cal. Unrep. 272, 34 Pac. 441 ... 467, 498
Sanger etc., Centerville etc. v. ... 287
Sanger Lumber Co., Phillips v. ... 270, 279
San Jacinto etc., Pelton v. ... 368
San Joaquin v. Beecher, 101 Cal. 70 ... 33, 35, 157, 219, 246, 301, 454, 465, 471, 480, 487, 496, 497

PAGE
San Joaquin v. Belding, 35 Pac. 653-663.....219, 454
San Joaquin etc., Carver v..... 286
San Joaquin etc. v. Gate City etc., 170 Cal. 250..... 281
San Joaquin v. Hewlett, 35 Pac. 353..... 454
San Joaquin v. Hitchcock, 35 Pac. 353..... 454
San Joaquin etc. v. Merced, 2 Cal. App. 593..... 9
San Joaquin etc., People v..... 16
San Joaquin Land etc. v. West, 94 Cal. 399.....236, 246, 293, 469
San Joaquin etc. v. Stevinson, 164 Cal. 221..... 632
San Joaquin etc., Stockton Gas etc. v..... 137
San Jose etc. v. Pharis, 58 Cal. 381..... 404
San Jose etc., Seeley v..... 210
San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 129.....211, 219
San Luis Obispo, Sussman v..... 289
San Luis Water Co. v. Estrada, 117 Cal. 168..... 79
San Mateo etc., Beedy v.....240, 469
San Pedro etc. v. Reynolds, 121 Cal. 74.....287, 292, 388, 418
San Rafael etc., Coleman v..... 86
San Rafael Co., Forbes v..... 278
San Rafael etc., Mahon v.....572, 581
Santa Ana etc., Spurgeon v.....316, 345
Santa Barbara, Montecito etc. v.....86, 280, 587
Santa Barbara etc., Underhill v.....
.....78, 83, 111, 145, 149, 163, 165, 166, 278, 290, 488
Santa Cruz R. R. Co. v. Schwartz, 53 Cal. 106-110..... 243
Santa Cruz v. Spreckels, 65 Cal. 193.....269, 452, 459, 477, 496
Santa Maria Oil Co., Campbell v.....455, 474, 494
Santa Rosa Bank v. Barnett, 125 Cal. 412.....11, 402, 403, 404, 412
Santa Rosa etc. R. R. Co. v. Central St. Ry., 4 Cal. Unrep. 950,
38 Pac. 986..... 604
Sargent, Welch v.....313, 386, 390, 392, 453, 458, 461, 462, 542
Sargent v. Wilson, 5 Cal. 505..... 145
Sausalito, Pacific Yacht Club v..... 554
Sausalito Bay etc. v. Sausalito Imp. Co., 166 Cal. 302..... 215
Savage etc., Barstow v.....303, 339
Savage, Tevis v..... 288
Savings Bank v. Barrett, 126 Cal. 413-417..... 75
Savings & Loan v. McKoon, 120 Cal. 179.....55, 56
Saxton, Glenn v.....239, 453, 458
Sayre v. Citizens' Gas, Light & Heat Co., 69 Cal. 207.....
.....452, 455, 459, 494
Sayward v. Houghton, 82 Cal. 628..... 315
Scadden Flat etc. v. Scadden, 121 Cal. 33.....255, 256, 604
Schaake v. Eagle etc., 135 Cal. 472.....134, 440, 447
Schafer, California Sugar etc. v.....375, 470, 486
Schallard v. Eel River etc., 70 Cal. 146.....81, 127, 500

PAGE
Schenck v. Bandmann, 81 Cal. 231 679
Schnittger v. Old Home Mining Co., 144 Cal. 603-606 .....
..... 212, 222, 223, 269
Schofield v. Doray, 89 Cal. 55 679
Schottler, Spring Valley etc. v 3, 9, 73
Schou v. Sotoyome Tribe, 140 Cal. 254 165
Schwartz, Santa Cruz R. R. Co. v 243
Schulte v. Blvd. Gardens etc., 164 Cal. 464 .... 436, 444, 447, 448, 451
Sciaroni, California Winemakers etc. v 285
Scott, Alferitz v 538
Scott, Crocker v 644
Scott v. Goodin, 21 Cal. App. 178 446
Scott v. Monte Cristo, 15 Cal. App. 453 266
Scott River etc., Richardson v 82, 83, 295
Scott v. Superior Sunset Oil Co., 144 Cal. 142 ..... 84, 266, 285
Seal of Gold M. Co. v. Slater, 161 Cal. 621 .....
..... 46, 139, 143, 151, 198, 211, 216, 217, 228, 232
Sebastian, Russell v 14
Seeley etc., Hudson v 247, 287
Seeley v. San Jose etc., 59 Cal. 22 210
Selfridge, People v 9
Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518 367
Selma Fruit Co., Stevens v 262, 289
Sferlazzo v. Oliphant, 24 Cal. App. 81 ..... 225, 230, 262, 277
Shakespear v. Smith, 77 Cal. 638-640 ..... 212, 223
Shanklin v. Gray, 111 Cal. 88 ..... 679, 680
Shannon v. Tooker, 167 Cal. 484 ..... 479, 491, 494
Sharkey, Hunt v 389, 453
Shasta etc., Galbraith v 102
Shasta River Canal, Rosborough v 159
Shattuck etc. v. Gillelen, 154 Cal. 778 ..... 335, 372
Shaver v. Bear River etc., 10 Cal. 396 ..... 265, 279
Shaw, R. H. Herron Co. v 107, 113, 257, 388, 396, 458, 497
Shaw v. Hollister etc., 166 Cal. 257 139
Shaw etc. R. Co. v. Little Rock etc. R. Co., 100 U. S. 605 130
Shaw's Flat etc., O'Brien v 570
Shedd, First National Bank v 130
Sheehy v. Shinn, 103 Cal. 325 356
Sheer v. Hoyt, 13 Cal. App. 662 422
Shepard, Tulare Irr. Dist. v 68
Sherman, Ferguson v 382
Sherman, Hanson v 101, 365, 372
Sherwood, Christie v 76
Sherwood v. Meadow Valley etc., 50 Cal. 412 ..... 303, 339
Sherwood v. Wallin, 154 Cal. 735 ..... 125, 233, 302
Shinn, Sheehy v 356
Shipman, Roman Catholic Archbishop v 83, 151

PAGE
Shively v. Eureka etc., 129 Cal. 296.....254, 463, 497
Shively v. Eureka etc., 5 Cal. App. 236.....211, 271
Shorb v. Beaudry, 56 Cal. 446-450..... 8
Sibley, Horseshoe Pier etc. v.....
.....33, 238, 240, 246, 465, 468, 469, 471, 477
Siebe v. Joshua Hendy etc., 86 Cal. 390..... 282
Sierra etc., California Safe Dep. etc. v..... 131
Sierra Land etc. v. Bricker, 3 Cal. App. 190.....59, 66
Sierra Valleys etc., Boca v.....38, 52, 60
Sierra etc., Fromm v..... 317
Sierra Nevada etc., Love v..... 295
Sierra etc., Myers v.....374, 379
Sierra Buttes etc., People v..... 146
Sierra Lumber Co., San Jose Sav. Bank v.....211, 219
Sierra etc., Symmes v..... 680
Silica Brick Co. v. Winsor, 170 Cal. —..... 242
Sime, Brewster v. 336, 339, 342
Simmens, Kullman v.....355, 357
Simonds Saw Co., Jameson v.....571, 611
Simpson, Crescent City Wharf etc. v..... 81
Simpson v. Ferguson, 112 Cal. 180..... 537
Sims v. Petaluma etc., 131 Cal. 656.....215, 415
Sims v. Petaluma etc., 6 Cal. Unrep. 540.....215, 415
Sims, Visalia Gas etc. v.....103, 138
Sinbad Dev. Co., Smith v., 11 Cal. App. 253..... 291
Sinbad Dev. Co., Smith v., 15 Cal. App. 166..... 266
Sioux Remedy Co. v. Cope, 235 U. S. 292, 59 L. ed. 58.....623, 636
Sixth District etc. v. Wright, 154 Cal. 119..... 88
Slater, Seal of Gold M. Co. v.....
.....46, 139, 143, 151, 198, 211, 216, 217, 228, 232
Sloane v. Southern Cal. Ry. Co., 111 Cal. 685.....584, 588
Smith v. Dorn, 96 Cal. 73-83.....217, 226, 232, 255
Smith v. Eureka Flour M. Co., 6 Cal. 1.....73, 104
Smith v. Ferries etc., 5 Cal. Unrep. 889, 51 Pac. 710.....
.....112, 113, 215, 255, 448, 450
Smith, Fortain v..... 10
Smith v. Gate City etc., 160 Cal. 446.....479, 489, 490, 491
Smith v. Jaccard, 20 Cal. App. 280..... 82
Smith v. Los Angeles Immigration etc., 78 Cal. 292.....212, 263
Smith v. Los Angeles etc. Assn., 78 Cal. 289..... 222
Smith v. Los Angeles etc. Ry., 98 Cal. 210..... 135
Smith v. Martin, 135 Cal. 247.....112, 302
Smith v. Morse, 2 Cal. 539..... 79
Smith, Moss v.....377, 446, 448
Smith, Mulligan v.....207, 290
Smith, Pacific Vinegar Works v., 152 Cal. 507..... 282

PAGE

Smith, Pacific Vinegar Works v., 145 Cal. 364.....
.....212, 216, 218, 271, 274, 275
Smith v. S. F. & N. P. Ry. Co., 115 Cal. 606.....
.....155, 180, 185, 186, 187, 189, 191, 323, 371
Smith, Shakespear v.....212, 223
Smith v. Sinbad Dev. Co., 11 Cal. App. 253..... 291
Smith v. Sinbad Dev. Co., 15 Cal. App. 166..... 266
Smith v. Superior Court, 97 Cal. 348.....530, 532
Sneath, Bliss v.....366, 400
Snediker v. Ayers, 146 Cal. 407.....213, 274
Snell, Cincinnati v..... 563
Somps, Francais v..... 679
Sonoma etc. v. Hill, 59 Cal. 110.....364, 365, 394, 404
Sonoma Valley Bank, Edwards v..... 317
Sonora v. Curtin, 137 Cal. 583-587..... 11
Sonora M. Co., Fraylor v.....158, 299
Sotoyome Tribe, Schou v..... 165
Soule, Bacon v..... 219
South Pasadena v. Pasadena etc., 152 Cal. 586.....137, 400
South Yuba v. Rosa, 80 Cal. 336.....54, 583, 624
Southern etc. v. Burr, 86 Cal. 283.....9, 141
Southern California etc. v. Bustamente, 52 Cal. 192.....81, 224
Southern California Ry. Co., Sloane v.....584, 588
Southern Pacific R. R., California Southern etc. v., 67 Cal. 59.. 133
Southern Pacific R. R., California Southern etc. v., 65 Cal. 293,
394.....559, 627
Southern Pacific etc., Chase v..... 561
Southern Pacific Ry., Donohoe v..... 145
Southern Pacific Co., Fresno etc. v.....141, 142, 280, 587, 588
Southern Pacific Co. v. Hyatt, 132 Cal. 240..... 142
Southern Pacific R. R., Lee v..... 515
Southern Pacific etc., Lewis v.....560, 561, 564
Southern Pacific Co., Pierce v.....616, 617
Southern Pacific etc. v. Purcell, 77 Cal. 72.....55, 583
Southern Pacific etc., Sacramento v..... 78
Southern Pacific etc. v. Superior Court, 14 Cal. App. 240..... 284
Southern Pacific etc. v. Van Schmidt, 118 Cal. 368..... 82
Southern etc., Vujacich v..... 430
Southwest etc., Daggett v.....382, 383, 390, 393
Sowlveere, Hanford etc. v..... 375
Spangenberg v. Nesbitt, 22 Cal. App. 274..... 314
Spangenberg v. Western etc., 166 Cal. 284..... 313
Sparks, Evans v..... 321
Spaulding Gold & Silver M. Co., Robinson v..... 488
Speedwell etc., Koch v..... 134
Sperry Flour Co., Bank of Yolo v.....561, 566
Spires, Los Angeles Athletic etc. v..... 469

PAGE
Spreckels v. Gorrill, 152 Cal. 383 331
Spreckels v. Nevada Bank, 113 Cal. 272-276 .....322, 335, 374, 577
Spreckels, Santa Cruz v. 269, 452, 459, 477, 496
Spring Valley etc., Cooper v., 16 Cal. App. 17 .....316, 340
Spring Valley etc., Cooper's Exrs., 171 Cal. — 317, 340
Spring Valley etc. v. San Francisco, 22 Cal. 440 .....21, 60
Spring Valley etc. v. San Francisco, 52 Cal. 125 22
Spring Valley etc. v. San Francisco, 61 Cal. 38 .....11, 14
Spring Valley etc. v. Schottler, 62 Cal. 110 .....3, 9, 73
Spurgeon v. Santa Ana etc., 120 Cal. 71 .....316, 345
S. S. F. Dock Co., Vandall v. 75, 76
S. S. White etc. Co. v. Commonwealth, 212 Mass. 35 .....667, 668
Staacke v. Bell, 125 Cal. 309 550
Stabler v. El Dora etc., 27 Cal. App. 516 .....205, 233
Stadtmuller, People's Home etc. v. 323, 375, 463, 467
Standard etc., Alaska Salmon etc. v. 582
Standard Quicksilver Co., Bell v. 230, 232, 464
Stanford, People v. 9, 11, 69, 79, 513, 518, 520, 582
Stansbury, Ramboz v. 82, 329
Staples, Stockton etc. v. 77, 90
State, Deseret Water Co. v. 632
State Loan & T. Co., Los Angeles v. 646
State etc. Ins. Co. v. Superior Court, 101 Cal. 135 .....
.....512, 518, 530, 533, 542
Stein v. Howard, 65 Cal. 616 110
Steinberg, Peek v. 284, 604
Steinman, Younglove v. 235, 459, 463
Stelling, California etc. v. 66, 67
Stephens v. Lemoore etc., 22 Cal. App. 579 .....
.....213, 482, 485, 486, 490, 493
Stevens, Derby v. 367, 374
Stevens v. Selma Fruit Co., 18 Cal. App. 242 .....262, 289
Stevinson, San Joaquin etc. v. 632
Stewart v. Mahoney etc., 54 Cal. 150 185
Stewart, Wise Realty Co. v. 333
Stilphin v. Ware, 45 Cal. 111 404
Stillwell v. Cutter, 146 Cal. 657 .....356, 357
St. Louis etc., Wolf v. 373
Stockton Lumber Co. v. Blodgett, 3 Cal. App. 94 584
Stockton Com. Harvester etc. v. Houser, 109 Cal. 1, 9-11 .....
.....230, 234, 303, 467, 483, 496
Stockton, McCormick v. 78, 282, 294
Stockton etc., People v. 63, 110
Stockton Savings & Loan Society, People v. 85, 514
Stockton Gas etc. v. San Joaquin etc., 148 Cal. 313 137
Stockton etc. v. Staples, 98 Cal. 192 .....77, 90
Stockwell v. Barnum, 7 Cal. App. 413 287

PAGE

Stohr v. San Francisco Musical Fund Society, 82 Cal. 557..... 166
Stone, Morrison v..... 255
Stone, Pacific Bank v.....209, 265, 266, 288
Story, Baines v..... 392
Story, National Carriage etc. Co. v.....313, 399
Strouse v. Sylvester, 6 Cal. Unrep. 798, 66 Pac. 600.....158, 479
Streeten v. Robinson, 102 Cal. 542.....265, 289
Strong v. Los Nietos etc., 137 Cal. 607..... 22
Strong Co., Trezevant v.....28, 29, 550, 559, 560, 561
Strout v. Natoma W. & M. Co., 9 Cal. 78-80..... 328
Struver, Eel River etc. v..... 570
Stuart, Whitehurst v.....367, 403
Sullivan v. Gage, 145 Cal. 759..... 530
Sullivan v. Grass Valley etc., 77 Cal. 421..... 583
Sullivan v. Triunfo etc., 29 Cal. 586..... 459
Sullivan v. Triunfo etc., 39 Cal. 459.....216, 274, 514
Superior Court, American etc. v.....543, 616, 618, 622, 636
Superior Court, Arroyo Ditch etc. v..... 494
Superior Court, California Fruit Growers etc. v..... 536
Superior Court, Dennis v..... 400
Superior Court, Elliott v.....530, 532
Superior Court, Eureka etc. v.....570, 624
Superior Court, Fischer v.....237, 530, 534, 536
Superior Court, Foster v.....202, 203, 512
Superior Court, Fresno etc. v.....550, 559, 560, 561, 627
Superior Court, Golden Gate etc. v..... 570
Superior Court, Grangers Bank v..... 554
Superior Court, Havemeyer v., 84 Cal. 361-380.....511, 530, 533
Superior Court, Havemeyer v., 87 Cal. 267..... 530
Superior Court, Keystone etc. Co. v.....541, 543, 621, 625
Superior Court, Kullman v..... 502
Superior Court, Lowe v.....533, 662, 668
Superior Court, Mark v..... 203
Superior etc., Morrow v.....364, 365
Superior Court, Murray v.....530, 534
Superior Court, People v..... 512
Superior Court, People's Bank v.....150, 155, 189
Superior Court, People's Savings Bank v..... 531
Superior Court, Postal etc. v..... 539
Superior Court, Real Estate Associates v..... 537
Superior Court, R. H. Herron Co. v..... 542
Superior Court, Smith v.....530, 532
Superior Court, Southern Pacific etc. v..... 284
Superior Court, State etc. Ins. Co. v.....512, 518, 530, 533, 542
Superior Court, Union Collection Co. v..... 391
Superior Court, Western etc. Mortgage Co. v..... 539
Superior Court, Western Union Tel. Co. v.....64, 631, 632

PAGE
Superior Court, Yore v.....511, 512, 530
Superior Sunset Oil Co., Scott v.....84, 266, 285
Supreme Council etc., Clark v..... 544
Supreme Council etc., Lachmann v..... 544
Sussman v. San Luis Obispo, 126 Cal. 526..... 289
Sutter Co. etc., Salfield v.....209, 210, 217, 224, 261, 277, 280, 297
Sutter St. R. R. Co. v. Baum, 66 Cal. 44..... 269
Sutter St. Ry., People v., 129 Cal. 545..... 512
Sutter St. Ry., People v., 117 Cal. 604-612.....511, 513
Swain, Dow v..... 330
Swamp etc. Dist. etc. v. Feck, 60 Cal. 403..... 583
Swartz, Colton L. & W. Co. v..... 87
Sweet, Whitehead v.....169, 200, 202, 237, 454, 487, 536
Swim v. Wilson, 90 Cal. 126..... 340
Sylvester, Strouse v.....158, 479
Symmes v. Sierra etc., 171 Cal. —..... 680

T

Table Mt. etc., Rowe v..... 571
Tafft v. Presidio etc., 3 Cal. Unrep. 152, 22 Pac. 485.....315, 326
Tafft v. Presidio etc., 84 Cal. 131-137..... 326
Talbot, Tulare Savings Bank v.....35, 242, 245, 375, 471, 497, 498
Tapscott v. Mexican etc., 153 Cal. 664.....441, 447, 448
Tatum v. Rosenthal, 95 Cal. 129.....368, 388, 391
Tay, Fox v..... 310
Taylor v. North Star etc., 79 Cal. 285.....100, 459
Taylor, Union etc. Mining Co. v..... 621
Tejunga, Johnstone v..... 290
Temescal Water Co., Waterbury v.....155, 203, 211
Templar Lodge, Robinson v.....164, 166
Temple St. Ry. v. Hellman, 103 Cal. 634-640..... 76
Terry v. Little, 101 U. S. 216..... 363
Teschemaker, French v.....363, 380, 455
Tevis v. Savage, 130 Cal. 411..... 288
Thomas v. Armstrong, 7 Cal. 286..... 141
Thomas v. Matthieson, 192 Fed. 495..... 383
Thomas v. Matthieson, 232 U. S. 221.....383, 609
Thomas, Munroe v..... 141
Thomas v. Placerville etc., 65 Cal. 600.....28, 610, 626, 629
Thomas v. Wentworth Hotel Co., 158 Cal. 275....365, 367, 383, 609
Thomas v. Wentworth Hotel Co., 16 Cal. App. 403.....
.....127, 242, 381, 383, 609
Thomason v. Ashworth, 73 Cal. 77..... 11
Thomasson v. Grace M. E. Church, 113 Cal. 558..... 286
Thompson v. Toland, 48 Cal. 99.....328, 336, 339, 342
Thompson v. Williams, 76 Cal. 155.....178, 227, 463, 468

PAGE
Tibbitts, Ontario etc. v.....55, 583, 624
Tidewater etc. v. Jordan, 163 Cal. 105.....125, 221, 759
Tilden v. Goldy Machine Co., 9 Cal. App. 9.....96, 299
Tilly, Bonney v.....216, 267, 274
Times-Mirror Co., Brady v.....559, 561, 567, 626
Times-Mirror Co., Tingley v..... 561
Tingley v. Times-Mirror Co., 144 Cal. 205..... 561
Tioga etc. v. Blossburg etc., 87 U. S. 137..... 621
Title Ins. Co. v. California Dev. Co., 171 Cal. —.....
.....91, 132, 144, 268, 630
Title Ins. Co., McKee v....110, 115, 123, 124, 125, 377, 410, 541, 609
Title etc. v. Kerrigan, 150 Cal. 320..... 24
Toberman, Los Angeles Gas Co. v..... 11
Tognazzini v. Jordan, 165 Cal. 19.....40, 525, 725
Toland, Thompson v.....328, 336, 339, 342
Tolman, Ball v..... 679
Tom Reed Min. Co., Hobbs v..... 681
Tooker, Shannon v.....479, 491, 494
Touhy, Buena Vista etc. v..... 596
Trabing v. California Nav. Co., 121 Cal. 137..... 290
Trainor, Wilson v..... 582
Treasurer v. Commercial etc., 23 Cal. 390..... 318
Tregear v. Etiwanda etc., 76 Cal. 537-539.....309, 322
Trenor v. Central Pac. R. R., 50 Cal. 222..... 266
Trezevant v. Strong Co., 102 Cal. 48.....28, 29, 550, 559, 560, 561
Triunfo etc., Sullivan v., 29 Cal. 586..... 459
Triunfo etc., Sullivan v., 39 Cal. 459.....216, 274, 514
Tropico Land etc. v. Lambourn, 170 Cal. 33..... 617
Truckee etc., Wood v.....9, 138, 141
Trustees California College, People v.....87, 88
Tulare Irr. Dist. v. Kaweah Canal, 5 Cal. Unrep. 330...126, 138, 451
Tulare Irr. Dist. v. Shepard, 185 U. S. 1..... 68
Tulare Savings Bank v. Talbot, 131 Cal. 45-49.....
.....35, 242, 245, 375, 471, 497, 498
Tuller v. Arnold, 98 Cal. 522..... 285
Turner v. Fidelity etc., 2 Cal. App. 136.....112, 256, 302, 393, 395
Turner v. Markham, 155 Cal. 562-570.....115, 248, 250, 256
Turney v. Morrisey, 22 Cal. App. 271..... 672
Tustin etc. v. Earl Fruit Co., 6 Cal. Unrep. 37, 53 Pac. 693..... 582

U

Ukiah Guaranty Co. v. Curry, 148 Cal. 256..... 672
Umpqua etc., Brandon v.....533, 662, 668
Underhill v. Santa Barbara etc., 93 Cal. 300.....
.....78, 83, 111, 145, 149, 163, 165, 166, 278
Union Building etc., Bories v..... 543

PAGE
Union Collection Co. v. Superior Court, 149 Cal. 790..... 391
Union Collection Co. v. Oliver, 23 Cal. App. 318.....263, 446
Union etc., McBoyle v..... 89
Union etc. Mining Co. v. Taylor, 100 U. S. 37..... 621
Union Savings Bank, Argues v..... 539
Union Savings Bank etc. v. Dunlap, 135 Cal. 628..395, 453, 458, 476
Union Savings Bank v. Leiter, 145 Cal. 696-710.....
.....110, 150, 239, 240, 256,
302, 380, 381, 390, 395, 405, 453, 456, 458, 462, 469, 476, 479, 498
Union Savings Bank v. Rinaldo, 6 Cal. App. 637.....228, 453, 480
Union Savings Bank v. Willard, 4 Cal. App. 693.....
.....339, 373, 389, 461, 466
Union Water Co., Kimball v..... 315
Union Water Co. v. Murphy etc., 22 Cal. 620.....74, 86
University Bank, Hubbard v..... 127
Upton v. Woman's Club of Kern, 19 Cal. App. 127.....378, 379
Urton v. Woolsey, 87 Cal. 38..... 554
U. S. Trust Co. v. Wabash etc. Ry. Co., 150 U. S. 287-300..... 529

V

Vaca Valley etc. v. Mansfield, 84 Cal. 560..... 81
Vallejo etc. v. Reed etc., 169 Cal. 545.....15, 26, 65
Vallejo etc. v. Reed etc., 18 Cal. App. Dec. 235, 245..... 26
Valley View etc., Brown v.....158, 210
Vandall v. S. S. F. Dock Co., 40 Cal. 88.....75, 76
Vandewater, Harding v.....217, 225, 233, 463, 468
Van Loben Sels, L. Scatena & Co. v..... 279
Van Schmidt, Southern Pacific etc. v..... 82
Vassault, San Buenaventura v..... 178
Ventura etc. v. Collins, 5 Cal. Unrep. 469..... 240
Ventura etc. v. Hartman, 116 Cal. 260.....240, 464, 470
Vercoutere v. Golden State etc., 116 Cal. 415.....
.....149, 150, 210, 444, 447, 451
Verdugo etc., Goodell v..... 212
Vermont etc., Black v..... 619
Vermont etc. v. Declez etc., 135 Cal. 579.....
.....107, 110, 113, 256, 302, 343, 386, 387, 388, 396
Visalia etc. v. Hyde, 110 Cal. 632....303, 323, 371, 459, 461, 463, 467
Visalia Gas etc. v. Sims, 104 Cal. 326.....103, 138
Vivienda Water Co., Crossman v.....523, 533
Volcano, People v.....63, 513
Von Schmidt v. Widber, 105 Cal. 157..... 4
Vujacich v. Southern etc., 21 Cal. App. 439..... 430

W

PAGE

Wabash etc. Ry. Co. v. Central Trust Co., 23 Fed. 513..... 529
Wabash etc. Ry. Co. v. Central Trust Co., 22 Fed. 272..... 529
Wabash etc. Ry., Central T. Co. v..... 529
Wabash etc. Ry. Co., U. S. Trust Co. v..... 529
Wade, Craig v..... 419
Wade, Pacific Ry. v..... 544
Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 223-227.....
.....568, 628, 632, 634
Wait v. Kern River etc., 157 Cal. 16-21.....308, 311, 318
Waldeck & Co. v. Pacific Coast etc., 2 Cal. App. 167..... 614
Walker, Major v..... 417
Wallace v. Bacon, 86 Fed. (Calif.) 558..... 243
Wallace v. Bentley, 77 Cal. 19-21..... 294
Wall v. Mines, 130 Cal. 27.....49, 60, 63, 67, 87, 520
Wallin, Sherwood v.....125, 233, 302
Walls, California etc. v..... 601
Walter v. Merced etc., 126 Cal. 586.....386, 392, 465
Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638....139, 232, 279
Ward v. California Celery Co., 15 Cal. App. 84.....493, 494
Ward, Hunt v.....376, 399, 400, 402, 405, 410, 411, 412
Ward, Kinard v.....211, 219
Ward Land Co. v. Mapes, 147 Cal. 752.....55, 623
Ward, People v..... 430
Ware, Stilphin v..... 404
Warner, Fresno Canal Co. v.....60, 582
Warner v. Warner, 100 Cal. 11..... 550
Washburn v. Huntington, 78 Cal. 573..... 540
Waterbury v. Temescal Water Co., 11 Cal. App. 632...155, 203, 211
Watkins v. Glas, 5 Cal. App. 68..... 81
Wayer, Homan v..... 580
Waymire v. San Francisco etc., 112 Cal. 646.....80, 254
Weaver, Bank of Yolo v.....239, 285, 475, 501
Webb, Lamb v..... 511
Webber, Emigrant Ditch Co. v..... 55
Weeks v. Garibaldi Gold Mining Co., 73 Cal. 601..... 54
Weill. See Raphael Weill etc.
Welch v. Gillelen, 147 Cal. 571.....335, 372
Welch v. Sargent, 127 Cal. 72.....
.....313, 386, 390, 392, 453, 458, 461, 462, 542
Welsh v. County of Plumas, 80 Cal. 338-342..... 141
Welsh v. Plumas County, 94 Cal. 368..... 21
Wells v. Black, 117 Cal. 157....147, 150, 380, 400, 402, 403, 411, 455
Wells Fargo & Co. v. Enright, 127 Cal. 669.....283, 367, 404
Wentworth, Coulter Dry Goods Co. v.....376, 400, 407, 408
Wentworth Hotel Co., Thomas v., 158 Cal. 275....365, 367, 383, 609

PAGE

Wentworth Hotel Co., Thomas v., 16 Cal. App. 403.....
.....127, 242, 381, 383, 609
Wentz, Marshall v.....366, 498
West v. Crawford, 80 Cal. 19.....16, 150, 239, 245, 465, 469
West, San Joaquin Land etc. v.....236, 246, 293, 469
West v. Will C. Prather & Co., 7 Cal. App. 81.....261, 279
West Coast etc., Baines v..... 391
West Coast etc., J. L. Mott Iron Works v..... 572
West Coast etc. v. Wulff, 133 Cal. 315.....334, 576
Westcott v. Gilman, 170 Cal. 562..... 74
Western Dev. Co., Atkinson v 134, 216
Western Gas Engine Co., Henderson v..... 293
Western Zinc etc., McKendrick v..... 571
Western Zinc Co., Newhall v.....259, 533, 668
Western Pacific Ry. v. Godfrey, 166 Cal. 346..365, 368, 371, 375, 417
Western Pacific etc., National Bank etc. v...313, 337, 502, 506, 577
Western Pacific R. R., Pixley v..... 280
Western Screen Co., Francis v.....66, 262
Western States Life etc. v Lockwood, 166 Cal. 185.....267, 600
Western etc., Spangenberg v..... 313
Western etc. Mortgage Co. v. Superior Court, 22 Cal. App. 413. 539
Western Union Tel. Co. v. Hopkins, 160 Cal. 106..... 644
Western Union Tel. Co. v. Los Angeles, 160 Cal. 124..... 644
Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679..
.....64, 631, 632
Westlake, People v..... 431
Westside etc., Herron Co. v.....571, 611
Wetmore v. Barrett, 103 Cal. 246..... 356
White v. Fresno etc., 98 Cal. 166..... 561
White, Old Settlers etc. v.....284, 538
Whitehead v. Sweet, 126 Cal. 67-72..169, 200, 202, 237, 454, 487, 536
Whitehurst v. Stuart, 129 Cal. 196.....367, 403
Whitney, Northwestern etc. v.....261, 263, 290
Whitten v. Dabney, 172 Cal. —.....250, 256, 260, 400
Whitten v. Dabney, 20 Cal. App. Dec. 22..... 260
Wickersham, Bank etc. v.....90, 451
Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18..... 289
Wickersham v. Brittan, 93 Cal. 37-39.....169, 202, 220, 254
Wickersham v. Crittenden, 110 Cal. 332..... 158
Wickersham v. Crittenden, 106 Cal. 327-329.....158, 255, 259
Wickersham v. Crittenden, 93 Cal. 17.....
.....158, 160, 212, 223, 237, 261, 415, 536
Wickersham v. Murphy, 93 Cal. 41..... 202
Wickersham, Pollitz v..... 357
Wicks, Riverdale etc. v.....55, 56
Widber, Von Schmidt v..... 4
Wilcox, Hughes Mfg. Co. v.....112, 301, 365, 369, 500

PAGE
Wilkinson, California Trona Co. v.....97, 107, 396
Willard, Union Savings Bank v.....339, 373, 389, 461, 466
Willcox v. Edwards, 162 Cal. 455..... 358
Will C. Prather & Co., West v.....261, 279
Williams v. Ashurst Oil Co., 144 Cal. 619..... 180
Williams, Bay View etc. v..... 499
Williams v. Bergin, 108 Cal. 166..... 7
Williams v. Carver, 171 Cal. —.....390, 460
Williams v. Gaylord, 186 U. S. 164, 46 L. ed. 1106.....139, 607
Williams, Hyatt v..... 4
Williams, Robinson v.....554, 561
Williams, Thompson v.....178, 227, 463, 468
Willey v. Benedict Co., 145 Cal. 601-604.....610, 612
Willey v. Crocker-Woolworth Natl. Bank, 141 Cal. 518..... 74
Willis, Gashwiler v.....82, 88, 207, 223, 224
Willis v. Lauridson, 161 Cal. 106..... 217
Wills v. Woolner, 21 Cal. App. 528..... 405
Wilson, Chollar Min. Co. v.....200, 201, 236
Wilson, Farmers etc. v..... 338
Wilson, Lem v..... 329
Wilson, Sargent v..... 145
Wilson, Swim v..... 340
Wilson v. Trainor, 27 Cal. App. 43..... 582
Winchester v. Mabury, 122 Cal. 522..... 417
Winchester v. Howard, 136 Cal. 462.....257, 417, 430, 561
Winona Wagon Co. v. Bull, 108 Cal. 1.....367, 403, 411, 412
Winsor, Silica Brick Co. v..... 242
Winston v. Idaho etc., 23 Cal. App. 211.....610, 616, 636
Winter v. Belmont etc., 53 Cal. 428..... 339
Wise Realty Co. v. Stewart, 169 Cal. 176..... 333
Witherby, O'Connor v..... 369
Withers, Johnson v..... 422
Witter v. McCarthy Co., 5 Cal. Unrep. 267..... 588
Wolf v. St. Louis etc., 15 Cal. 319..... 373
Woman's Club of Kern, Upton v.....378, 379
Wood etc. v. Herman, 139 Cal. 716..... 394
Wood, Lady Washington etc. v.....163, 278, 450
Wood & Tatum Co., Meister etc. v..... 286
Wood v. Truckee etc., 24 Cal. 474.....9, 138, 141
Woodbridge etc., Atlantic etc. v..... 111
Woodbury, Mokelumne Hill Canal Co. v.....21, 59, 364, 367
Woodroof v. Howes etc., 88 Cal. 184.....257, 276, 292, 415
Woodward, Dartmouth College v..... 6
Woodward, Krouse v., 110 Cal. 638.....318, 329
Woodward, Krouse v., 5 Cal. Unrep. 230..... 321
Woodward, Miles v.....606, 608, 679
Woodworth, Balfour v.....230, 233

PAGE
Wooster, Donohoe v. 565
Wrenn Invest. Co., Flickinger v. 446
Wright, California Steam Nav. Co. v. 582
Wright v. Central etc., 67 Cal. 532 . . . . . 171, 200
Wright v. Oroville G. & M. Co., 40 Cal. 20 . . . . . 254, 415
Wright, Sixth Dist. etc. v. 88
Wulff, West Coast etc. v. 334, 576

Y

Yamato v. Bank etc., 170 Cal. 351 341
Yarnell, Poor v. 502
Yoakum, Danielson v. 365, 367, 380
Yore v. Banker's etc., 88 Cal. 609 561
Yore v. Superior Court, 108 Cal. 431 . . . . . 511, 512, 530
Yost v. Commercial Bank of Santa Ana, 94 Cal. 494 538
Youd v. German Savings etc., 3 Cal. App. 710 85
Young v. New Standard etc., 148 Cal. 306 336
Young v. Rosenbaum, 39 Cal. 646 . . . . . 365, 403
Younglove v. Steinman, 80 Cal. 375-377 . . . . . 235, 459, 463
Yountz, People v. 420
Yuba Co. v. North America etc., 12 Cal. App. 223 . . . . . 561, 568
Yule v. Bishop, 133 Cal. 574 406

Z

Zadig, Baldwin v. 357
Zany v. Rawhide etc., 15 Cal. App. 373 . . . . . 584, 588
Zeila Mining Co., Ashton v. 322, 374, 438
Zellerbach v. Allenberg, 99 Cal. 57-70 . . . . . 158, 434
Zellerbach, Martin v. 134, 214, 278, 436, 439, 440, 442, 447, 451
Zellerbach, Miners Ditch Co. v. 81, 88, 93, 136
Zierath etc. v. Croake, 21 Cal. App. 222 173
Zottman v. San Francisco, 20 Cal. 96-97 78
Zubiate M. Co., Dickinson v. 243, 280, 612

CALIFORNIA CORPORATIONS

CHAPTER I

ORIGIN AND CHARACTER OF CORPORATIONS

No attempt will be made here to go into the history of corporations; but a few observations of their origin will shed light on later statutes and decisions. Students find traces of them in the laws of Solon, in Greece, almost 600 B. C., and say that they were recognized in the "Twelve Tables" of the Roman law not long afterward, but these aggregations of persons had so slight resemblance to modern corporations that they can be said to be scarcely more than the embryo.

The earliest corporations were aggregate, and of a civil or political nature. Later they became the recipients of property, and were often organized for the sole purpose of administering the property according to the wishes of the founder or donor, who retained certain visitorial powers over their management. By analogy, later, the king, who granted charters to business or trading corporations, retained, to a certain extent, visitorial powers over such corporations, which were exercised through the Court of King's Bench. In the course of time, those powers fell into so great disuse that it has erroneously been said that they entirely ceased; but of late years they have been revived quite extensively in this country in many ways, especially over corporations engaged in what is commonly called public service and interstate business.

A corporation has been defined as "an artificial being, invisible, intangible, and existing only in contemplation of law." More amplified definitions simply add more or less of the peculiarities of its organization, composition, powers, manner of operation and of perpetuation of its life, and to be comprehensive would necessarily be of great length. The individuals composing it are not separately regarded, but constitute one single body, an ethereal person possessing substantially all the powers and functions of a natural person. But the law is slowly coming to adopt more rational views, ideas which are not so wholly metaphysical, and to recognize the obvious fact that the legal entity of a corporation as a creature without a body or soul, visible only in a mode of reasoning, an imponderable, intangible creation of the mind, is but a fiction, a figure of speech, and that it "is really an association of persons," and that "justice should not be defeated by the assumed innocence of a fiction."

In England, where our laws on this subject had their origin, corporations were first created by royal charter. Blackstone said that a franchise was a royal privilege, or a branch of the royal prerogative, existing in the hands of a subject, and could arise only from the king's grant.

The abuse of granting charters only to favorites of the king was aggravated by the further fact that usually he had either an open or a secret interest in their profits. Hence evils arose which, in the course of time, produced restrictive rules, many of which we of this day inherit. Jealousies of such privileges and powers naturally provoked hostility among the people, which resulted in taking away from the sovereign all power to create such favorites, and lodged it in Parliament, where it exists today; a special act of Parliament being even now necessary to create most corporations.

But, the most difficult of all operations being to supplant privilege, the change was really no more than one of method; charters were still granted by Parliament (as sometimes by the legislatures of our own country) to chosen or favored persons. In time, even this modification of the method of granting privileges was swept away in this country, and general laws for the creation of corporations, available to all persons, were gradually enacted.

It is logically, and also correctly, declared that the statutes granting and defining the powers of a corporation are the charter of the corporation. The "Articles of Incorporation" are a declaration only of the specific purposes and powers permitted by the statutes, which powers and purposes are selected by the persons who are forming a corporation to limit and govern it.[1]

While the *ancien regime* existed, jealousies of the special privileges of these organizations and of the sovereign power, in the effort to reasonably limit and restrain them, resulted in establishing certain "general principles" in the common law, which like the marks of "type" observed by naturalists in the animal kingdom, are plainly observable in the law and in the decisions of our courts at this day. In the early English cases, the powers of corporations were strictly limited to those expressly or impliedly authorized in the charter, as distinguished from those of a natural person, who may do anything not forbidden by law.

In England, however, this restriction has been so far relaxed during the last century that it has been said that a corporation is capable of binding itself by any contract, except when the statutes expressly or by clear implication prohibit such a contract.

1 Spring Valley etc. Co. v. Schottler, 62 Cal. 69, 110.

But the American courts have preserved many archaic rules and principles concerning the powers and internal conduct of the affairs of corporations, long ago discarded where they had their origin; like certain words and idioms preserved in the speech of this country which have become obsolete or antique in the mother country. An instance is observed in the case of municipal corporations, where even retrogression supplanted the usually unchanging character of definition. Formerly it was said of them that they had no powers except those expressly granted or which were necessarily or fairly implied in or were incident to the exercise of those expressly granted, and those essential to their declared objects and purposes. But a celebrated jurist and writer added the words, "not simply convenient but indispensable." These additional words have been approved by a few courts, unfortunately our own included.[2] This addition was made a century or more too late; its spirit is medieval. As an aphorism it may shine brilliantly, but it can not long make headway against the necessities and progress of civilization. If the right to carry out a certain purpose exists, the steady drift of the law is to permit the means or methods of so doing which are the most convenient for that purpose; not to require a search for the inconvenient, or to make the inconvenient indispensable.

The evolution of the law has reached the point that new corporations are created by the people only, by the act of as few as three persons, without asking leave of the king or of any privilege dispensing power, and for the purpose of carrying on any lawful business. They have proved themselves so useful and efficient that they have become almost numberless, and reach

[2] Von Schmidt v. Widber, 105 Cal. 151, 157, 38 Pac. 682; Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41; Oakland v. Carpentier, 13 Cal. 540, 546.

down to the most inconspicuous and humble business affairs of our life.

A corporation, however, is nothing other than its stockholders or members, transformed by law into, and existing as, one legal being. The incorporators and their associates and successors are the "body politic or corporate by the name stated in the certificate" (Civil Code, sec. 296), and as such body politic or corporate they hold the right to exist and transact the business specified in their Articles. They hold the right in their collective capacity as a corporation, and not severally as persons. They have no rights in regard to the corporate franchise that they can exercise, except through the corporation. It is the corporation, the "body politic or corporate," the legal creature comprised of the incorporators, their associates, and successors, that is invested by the state with life and the power to do.[3]

WAVERING FAVOR AND DISFAVOR

The extreme disfavor with which corporations were regarded is exemplified in an early case in California, where the court says: "A corporation is little more, under our laws, than a joint stock company under the English laws; indeed, in its true nature more nearly resembling a limited partnership under special articles than a corporation at common law."[4] In cases free from partnership complications, it was said that "a corporation is a creature of legislation. Its rights, powers, and duties are conferred and defined by statute. Without such statutory authority it could not exist or transact any business."[5] As a general statement of the

[3] Bank of California v. San Francisco, 142 Cal. 276, 281, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832.

[4] Chater v. San Francisco etc., 19 Cal. 219, 246.

[5] Moran v. Ross, 79 Cal. 159, 164, 21 Pac. 547; People v. Dashaway Assn., 84 Cal. 114, 117, 12 L. R. A. 117, 24 Pac. 277; Boca Mill Co. v. Curry, 154 Cal. 326-333, 97 Pac. 1117.

legal status of a corporation, this expresses the law as it exists today, although in one respect it has been widely departed from. Where many of the requisites of its organization have been irregularly performed and in some cases entirely omitted, it is declared, notwithstanding, to be a *de facto* corporation, and that its proceedings can not be assailed by those dealing with it, nor can it be deprived of its franchise except in a direct proceeding by the state.[6] But it was said if the law under which it was organized was unconstitutional, that the pretended law is not a law, and conferred no rights, and afforded no protection, and an organization under it was not even a *de facto* corporation.[7]

In the older states of this country, after the practice of granting charters to the people generally instead of to royal favorites grew up, the pendulum of legal construction swung toward liberality in their behalf, culminating in the celebrated Dartmouth College case, where the charter was held to be a contract between the state and the individuals forming the corporation, and not only irrevocable by the state, but that none of its powers could be abridged or modified by the state.[8] The evil effects of this decision, with its ramifications, penetrated deeply and widely into the fabric of the state, subverting the rights and taking away the protection of the people. It can hardly be supposed that they were foreseen by the learned jurists who sanctioned it, including the great Marshall, or by Daniel Webster, whose argument was potent in securing it. It made a corporation, within the lines of its charter, scarcely subject to the state, almost independent of the state, an invincible power within the state. It produced a tremendous reaction in public sentiment, resulting in

6 Los Angeles etc. v. Spires, 126 Cal. 541, 58 Pac. 1049.

7 Brandenstein v. Hoke, 101 Cal. 131, 143, 35 Pac. 562.

8 Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

the general adoption of statutes declaring that all charters thereafter granted should be subject to amendment or repeal by the law-making power. While the Dartmouth College case has never been reversed, it being almost impossible to secure reversals of decisions of which this case is a shining example, its principal doctrine has been almost totally destroyed by the legislatures of all the states in the Union. About all that is now left of it is that a corporation's property (not the right to conduct business) can not be taken without due compensation.

One of the effects of this decision was to give a new birth to the doctrine of strict construction of the powers of a corporation, and the means and the manner of exercising them. Instead of corporations being aided by this decision, for three-quarters of a century they have struggled, often vainly, with entangling laws and decisions, now resulting in injury to them, then in injury to the public; this being done, sometimes under the doctrine of *ultra vires*, sometimes under the judicially invented doctrine that "the mode is the measure of the power,"[9] and at other times under the strictness of rules of operation or procedure; all these subverting justice and violating every voice of conscience.

Definitions have not been the greatest producers of evil results; that distinction belongs to what are called "established principles" and "rules." Indeed, in law, "principles" rise little higher than "rules," except that they are declared to be unchangeable. They are not fashioned or given to us by the Divine Ruler, nor by His inspiration, but are deduced by the very imperfect wisdom of men usually from very few facts and circumstances. Imbued with the power of words and

[9] Williams v. Bergin, 108 Cal. 166-170, 41 Pac. 287, followed in many cases.

formulæ, they attribute to them mysterious power, and by the strange impulse of the "affective" and the "mystic reasons" (which are no reasons at all) so universally found in mankind, they are erected then into idols to be worshipped. Everything is sacrificed to them, as to Moloch. Nor is the power of these principles to resist overthrow weakened by the discovery of numberless antagonistic facts which prove that they are untrue or absurd. Therefore, it is said that "interpretation" of the law never can, or at least never has, become a science. Having once declared that the sun stood still, under the doctrine of *stare decisis,* all human affairs must be adjusted to that incontestable event. Since making that discovery, "interpretation" has made another equally wonderful; that is, that true advancement is made by going backward. The just rights and obligations of all persons connected, or doing business, with corporations, as well as those in other relations, are daily set aside or distorted by the application of half true, untrue, or misshapen "principles"—for the rational mind did not dream of their existence. We will encounter many of them as this work progresses, and will notice a few.

A line of singular cases followed the Chater decision. One of them, the case next following, was where partners organized a corporation for greater convenience in handling the business of the partnership which they turned over to it; it was said "the truth is, the corporation, under our system, following such an agreement, would be the mere agency of the associates, created for the sake of convenience in carrying out the agreement."[10] On the dissolution of the partnership by the death of one of the partners, the capital stock of the corporation was ordered sold and the proceeds distributed.

[10] Shorb v. Beaudry, 56 Cal. 446-450.

Notwithstanding its anomalous character the doctrine of this case has come down to recent time.[11] No statute has ever been referred to which gives power to administer, much less to wind up, a corporation in this manner, and we admit our inability to reconcile these cases with the admitted principles governing the organization, conducting, and winding up of corporations.

FRANCHISE TO EXIST

The right to exist as a corporation is itself a franchise;[12] it is not a naked power but a power coupled with an interest vested in the corporation, and is in the nature of a public trust and can not be transferred by forced sale, or assigned, except when permitted by statute, and then only in the manner provided in the statute.[13] But this doctrine does not usually apply to its property. This franchise is separate and distinct from such franchises as it may acquire from the state, cities, counties, etc., for public uses;[14] such franchises do not become a part of its franchise to exist, but in case of railroads, gas companies, etc., that part of its

11 Cornell v. Corbin, 64 Cal. 197, 200, 30 Pac. 629; Kohl v. Lilienthal, 81 Cal. 378, 397, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; Behlow v. Fischer, 102 Cal. 214-215, 36 Pac. 509; Hunt v. Davis, 135 Cal. 31-34, 66 Pac. 957; Baldwin v. Miller & Lux, 152 Cal. 454-457, 92 Pac. 1030.

12 People v. Selfridge, 52 Cal. 331; Spring Valley etc. v. Schottler, 62 Cal. 69; Bank of California v. San Francisco, 142 Cal. 276, 279, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; Horn etc. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164, 12 Sup. Ct. 403.

13 Wood v. Truckee etc. Co., 24 Cal. 474; People v. Stanford, 77 Cal. 360, 371, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; Southern etc. Co. v. Burr, 86 Cal. 279, 283, 24 Pac. 1032; Gregory v. Blanchard, 98 Cal. 311, 313, 33 Pac. 199; Risdon etc. Co. v. Citizens etc. Co., 122 Cal. 94, 97, 68 Am. St. Rep. 25, 54 Pac. 529.

14 San Joaquin etc. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

property which is indispensable to carry out its franchises is held to be inseparable from its franchises. A stockholder owning a majority of the stock does not own the franchise of a corporation.[15]

CONSTITUTIONAL PROVISIONS

No special privileges may be granted by the legislature

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." —Article 12, section 21.[16]

"The legislature shall not pass local or special laws in any of the following enumerated cases: Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this state, or to any municipal corporation therein. Granting to any corporation, association or individual any special or exclusive right, privilege or immunity." —Article 4, section 25.

Corporations must be formed under general laws

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section,

15 Johnson v. Kirby, 65 Cal. 482, 488, 4 Pac. 458.

16 As applied to taxation, People v. Central Pac. R. R., 83 Cal. 393, 413, 23 Pac. 303; as to toll bridges, Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; as to street lighting, Mutual etc. Co. v. Ashworth, 118 Cal. 1, 5, 50 Pac. 10; prohibits laws as to wages paid by corporations, Johnson v. Goodyear etc. Co., 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 57 Pac. 304.

may be altered from time to time or repealed."—Article 12, section 1.[17]

[17] Every corporation when it accepts its charter consents to regulation by the state, Spring Valley etc. v. San Francisco, 61 Cal. 18, 38; which may be done by general laws, Thomason v. Ashworth, 73 Cal. 77; and impose new terms and conditions on its right to do business, San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 119, 5 Am. St. Rep. 425, 15 Pac. 380. There is no natural right of a corporation, either domestic or foreign, to do business in this state, ibid, and Sonora v. Curtin, 137 Cal. 583-587, 70 Pac. 674. A corporation can not be created by legislative recognition, except (formerly) a municipal corporation, Oroville etc. Co. v. Plumas County, 37 Cal. 354-362; Los Angeles Gas Co. v. Toberman, 61 Cal. 199, 200. This section does not prohibit individuals assigning a franchise to a corporation, People v. Stanford, 77 Cal. 360, 371, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. The legislature can not confer benefits or impose duties on one corporation not conferred or imposed on all organized under the same law, for example, as to taxes, People v. Central Pac. R. R., 83 Cal. 393, 23 Pac. 303; People v. Bagley, 85 Cal. 343, 24 Pac. 716; In re Madera etc. Dist., 92 Cal. 296, 316, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675; may consolidate, Market St. Ry. Co. v. Hellman, 109 Cal. 571, 586, 42 Pac. 225; may change name under a general law, Matter of La Societe etc., 123 Cal. 525, 56 Pac. 458; old laws continued, Santa Rosa Bank v. Barnett, 125 Cal. 407, 412, 58 Pac. 85; organization invalid, may be recognized and made valid by legislature, People v. Levee Dist. etc., 131 Cal. 30, 63 Pac. 676. This section refers only to private corporations and has no application to public corporations, Napa etc. Hospital v. Dasso, 153 Cal. 698, 703, 15 Ann. Cas. 910, 18 L. R. A. (N. S.) 643, 96 Pac. 355. Under this section and section 383 of the Civil Code the legislature has power to investigate the affairs of a corporation, In re Bunkers, 1 Cal. App. 61, 81 Pac. 748. Before the amendment of 1908 to section 7 of this article, it was held that this section, together with section 7, made unconstitutional an act of the legislature providing for an extension of the time of existence of corporations, Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117. The legislature may change the conditions upon which corporations may continue to exist, Kaiser etc. Co. v. Curry, 155 Cal. 638, 652, 103 Pac. 341; and that every corporation accepts its charter subject to the exercise of this power. Language of similar import was used in the Boca Mill case, supra, and in Market St. etc. v. Hellman, 109 Pac. 571 (p. 584), 42 Pac. 225, the court said, "When an individual becomes a stockholder in a corporation, it is with the implied assent on his part to the right of the legislature to alter and amend the law within the scope of

These constitutional restrictions were enacted in conformity to the wide and profound opposition of public opinion to the doctrine of the Dartmouth College case, and are self-explanatory.

The legislature also has passed a law similar to the first section above. (Civil Code, sec. 404.)

LENDING STATE OR MUNICIPAL CREDIT TO CORPORATION PROHIBITED

Article 4, section 31, of the constitution prohibits the state or any municipality giving or lending its credit in aid of any person, association, or corporation, or subscribing for stock or becoming a stockholder in any corporation. This provision put an end to granting bonuses, or aid in any form, to any railroad or other corporation.

So far as it affects ordinary corporations, it reads as follows:

> The legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor

the constitutional provision, and is as binding upon him as a contract to like effect of his own making would be." See In Matter of College Hill etc. Ass'n, 157 Cal. 596, 108 Pac. 681.

See section 404 of the Civil Code for similar provisions.

But such amendments must not deprive corporations of due process of law or the equal protection of the law or rights guaranteed by the federal constitution; nor can the legislature alter, amend, or repeal the charters of foreign corporations, Johnson v. Goodyear Min. Co., 127 Cal. 4, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the legislature granting aid pursuant to section 22 of this article; and it shall not have power to authorize the state, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever.

Article 12, section 13, of the constitution is as follows:

> The state shall not, in any manner, loan its credit, nor shall it subscribe to or be interested in the stock of any company, association or corporation.

STATE MAY REGULATE CHARGES OF PUBLIC SERVICE CORPORATIONS

Article 4, section 33, of the constitution empowers the legislature to regulate the charges for services of telegraph, gas and other public service corporations, and reads as follows:

> The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.

USE OF STREETS FOR SUPPLYING LIGHT AND WATER

The provisions of article II, old section 19, of the constitution granted the right, where there are no such public works owned or controlled by a city, to any

individual or corporation to supply water or light to a city or its inhabitants, upon condition that the city shall have the right to regulate the charges therefor.[18]

The supreme court of the United States has rendered a decision in which it is declared that the amendment of this section in 1911 is ineffective and unconstitutional, as to corporations formed and which had begun the construction of works for and laying pipes in the streets of a city for the purpose of supplying the inhabitants with light, before the adoption of this amendment, and that such a corporation can not be restrained or limited in extending its pipes in streets not previously used by it except upon a franchise therefor, by purchase from the city.[19] This section was amended in 1911 and now reads as follows:

> Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. (Amendment October 10, 1911.)

18 Spring Valley etc. Co. v. San Francisco, 61 Cal. 18.

19 Russell v. Sebastian, 233 U. S. 195, Ann. Cas. 1914C, 1282, 58 L. Ed. 912, 34 Sup. Ct. 517.

CORPORATE PROPERTY SUBJECT TO EMINENT DOMAIN

Article 12, section 8, of the constitution is as follows:

> The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals; and the exercise of the police power of the state shall never be so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well-being of the state.[20]

CHINESE, EMPLOYMENT OF

The constitutional and statutory prohibitions of corporations employing Chinese have been held to be in conflict with the Federal Constitution and the treaty with China and void,[21] and while the constitutional provision has never been repealed it is now obsolete.

CORPORATIONS—DEFINITION

Section 283 of the Civil Code is as follows:

> § 283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by law, it may continue for any length of time which the law prescribes.

PRIVATE CORPORATIONS, HOW FORMED

Section 285 of the Civil Code is as follows:

> § 285. Private corporations may be formed by the voluntary associations of any three or more persons in the manner prescribed in this article. A majority of such persons must be residents of this state.

20 For an elaborate discussion of evidence and purposes, see Vallejo etc. Co. v. Reed etc. Co., 169 Cal. 545, 147 Pac. 238.

21 In re Parrott, 5 Pacific Coast Law Journal 161; Ex parte Kuback, 85 Cal. 274, 20 Am. St. Rep. 226, 9 L. R. A. 482, 24 Pac. 737.

FOR WHAT PURPOSES

Section 286 of the Civil Code is as follows:

> **§ 286.** Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

These sections apply to the organization of all corporations; it was not necessary in 1887 to organize a water company under the act of 1872—it could be done under this act also.[22]

WHAT ARE PUBLIC AND PRIVATE CORPORATIONS

Section 284 of the Civil Code is as follows:

> **§ 284.** Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state; all other corporations are private.

Cities and towns, school districts, etc., are public corporations. A county is not a public corporation, but a subdivision of the state. Reclamation districts and levee districts are neither public nor private corporations, but public agencies,[23] as is also a district agricultural society.[24] Irrigation districts are public corporations as to some of their functions, and private as to others.[25] Sanitary districts are public corporations.[26]

QUASI-PUBLIC CORPORATIONS

Gas, water, electric light companies supplying the inhabitants of cities and towns with their products, and

22 West v. Crawford, 80 Cal. 19-30, 21 Pac. 1123.

23 Reclamation Dist. v. Sacramento, 134 Cal. 477, 66 Pac. 668; People v. Reclamation Dist., 117 Cal. 114, 121, 48 Pac. 1016; Dean v. Davis, 51 Cal. 406.

24 People v. San Joaquin etc. Assn., 151 Cal. 797, 91 Pac. 740.

25 Merchants etc. Bank v. Escondido etc. Dist., 144 Cal. 329, 77 Pac. 937.

26 In re Werner, 129 Cal. 567, 62 Pac. 97.

street railroads, in some respects are quasi-public corporations, as will be seen hereafter. The term quasi-public corporation has never been satisfactorily defined, but it may be said generally that it is one which performs some service or obligation to some portion of the public, but has a capital stock and in the capital and profits of which private individuals have an interest. All other corporations are private.

HOW FORMED AND PURPOSES

Private corporations may be formed by the voluntary association of any three or more persons, a majority of whom must be residents of California, and for any purpose for which individuals may associate themselves.[27]

The language of these sections being so simply and clearly expressed, almost no controversy has arisen over their meaning. The purposes for which a corporation is formed must, however, be fully and clearly set forth in its Articles of Incorporation, for under sections 354 and 355 of the Civil Code its powers are limited to those given by statute and such as are essential for its purposes. The most frequent error in preparing the Articles is omission of purposes, rather than including too many. Generally speaking, the doctrine of *ultra vires* has been given a very wide scope in this state, and it is a safe rule to consider every purpose excluded which is not expressly stated in the Articles. Often, in Articles, the purposes are stated in the form of powers, but that is without objection if it is clear that the language really describes a purpose. It should be borne in mind that the powers of a corporation can not be extended beyond those enumerated in the statutes, and "such as are necessary to the exercise of the

[27] Civil Code, secs. 285 and 286, supra.

powers so enumerated and given." See post, subject Powers.

CORPORATIONS BEFORE THE CODES

Sections 287 and 288 make provisions for corporations organized before the adoption of the Civil Code, reorganizing under the provisions of the code, if they so desire, but if they do not, that they shall continue to exist under the laws under which they were organized. So few corporations, not subject to the code provisions, now exist that these provisions are of no general interest, and reference only is made to these sections for particulars.

It has been decided, however, that the only provisions of the codes which do not affect corporations organized before the codes took effect, where the corporation does not elect to continue its existence thereunder, are those which relate to the formation and existence of the corporation.[28]

[28] McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

CHAPTER II

ARTICLES OF INCORPORATION

Section 289 of the Civil Code is as follows:

§ 289. The instrument by which a private corporation is formed is called "Articles of Incorporation." (Enacted March 21, 1872.)

WHAT THEY SHOULD CONTAIN

Section 290 of the Civil Code is as follows:

§ 290. Articles of Incorporation must be prepared, setting forth:

1. The name of the corporation.

2. The purpose for which it is formed.

3. The place where its principal business is to be transacted.

4. The term for which it is to exist, not exceeding fifty years.

5. The number of its directors or trustees, which shall not be less than three, and the names and residences of those who are appointed for the first year;

Provided, that the corporate powers, business, and property of corporations formed or to be formed for purposes other than profit may be exercised, conducted, and controlled by a board, consisting of such number of directors as may be in the constitution and by-laws provided; and corporations so formed may, in their constitution or by-laws, provide for the length of time that the directors, or any number thereof, shall act, and may in like manner provide that certain directors, or a certain number of the board of directors, to be selected by the corporation or the board of directors, in the mode and manner provided in the constitution or by-laws, shall act for any specified length of time,

or otherwise, as shall be in the constitution or by-laws set forth.

6. The amount of its capital stock, and the number of shares into which it is divided and the par value thereof.

Corporations formed for profit, pursuant to the provisions of this code, may, by their Articles of Incorporation, provide for the classification of their capital stock into preferred and common stock. In the event that the Articles of Incorporation shall provide for such classification the same must contain a statement of the number of shares of stock to which preference is granted, and the number of shares of stock to which no preference is granted. The Articles of Incorporation shall also state, in clear and succinct manner, the nature and extent of the preference granted, and except as to the matters and things so stated, no distinction shall exist between said classes of stock or the owners thereof;

Provided, however, that no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation; and provided, further, that the preferred and common shares shall be of the same par value.

7. If there is a capital stock, the amount actually subscribed, and by whom. (Stats. 1915, p. 1481.)

The amendment of 1915 simplified the phraseology of this section, but left out the provision for increasing or decreasing the number of directors by a very simple proceeding; therefore the relief afforded by the Los Banos[1] decision is lost.

All things considered, this is the most important document ever executed by, or more strictly speaking in behalf of, a corporation, for the validity of all the busi-

1 Bank of Los Banos v. Jordan, 167 Cal. 327, 139 Pac. 691.

ness it can ever do will rest upon it. Especially is this true in California, where Articles of Incorporation are so strictly construed.

There must be a substantial compliance with the statutory requirements concerning the organization of corporations,[2] and that can not be dispensed with. But an act incorporating a water company providing that it shall lay a certain amount of pipe within a year, does not make the construction of this work a condition of its existence as a corporation; a strict, literal compliance with all requirements of the statute is not essential, slight defects or omissions will not render the proceedings invalid.[3]

The Articles must not only be signed and acknowledged by at least three persons, a majority of whom must be residents of this state, but also by all the persons who are made directors therein for the first year. See Civil Code, section 292, *infra*.

In case of two corporations incorporated under special acts of the legislature, when such acts were permitted, both public service corporations, it was held that whenever there is serious doubt as to the interpretation of the law conferring the franchise it should be construed most strongly against the corporation,[4] and that it must be construed most beneficially to the public interests.[5] But this degree of strictness is not applied to ordinary business corporations as the following pages will show.

In the absence of any contrary provision in the charter of an ordinary corporation, or as to water com-

2 Mokelumne Hill M. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Harris v. McGregor, 29 Cal. 124.

3 Spring Valley Water W. v. San Francisco, 22 Cal. 434.

4 Spring Valley W. W. v. San Francisco, 22 Cal. 434.

5 Welsh v. Plumas County, 94 Cal. 368, 29 Pac. 720.

panies in the by-laws, resolutions or certificates of stock, all stockholders are equal in right.[6]

Where the majority of the members of an association form a corporation under the same name and for the same purposes and take over its books and much of its property, but the old association continues its existence (by the minority of the members) and holds some of its property, the old association can not exclude the membership of the corporation from any interest in the property of the old association.[7]

It is a well settled rule that private corporations can exercise no powers but those expressly granted, and such as are incidental thereto. It was said by Crockett J. in a concurring opinion that "the rule in construing statutes granting franchises (in this case the charter) to private corporations is that all doubts are to be resolved in favor of the public.[8] An incorporation was held invalid because not in conformity with the statutory requirements.[9] But after such an organization had been carrying on business as a corporation for sixteen years it became at least a *de facto* corporation, and it is stated the legality of its organization can not be attacked collaterally, and that, although many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed or entirely omitted, yet such irregularities and defects will not defeat the incorporation when the questions are raised collaterally.[10] Articles of a corporation to run a sawmill and manufacture lumber are not rendered invalid by reason of including power to operate railroads, etc. (not being

6 Richey v. East Redlands Water Co., 141 Cal. 221-228, 74 Pac. 754.

7 Strong v. Los Nietos etc. Ass'n, 137 Cal. 607, 70 Pac. 734.

8 Spring Valley W. W. v. San Francisco, 52 Cal. 111, 125.

9 McCallion v. Hibernia etc. Soc., 70 Cal. 163, 167, 12 Pac. 114.

10 Los Angeles Holiness Band v. Spires, 126 Cal. 541, 544, 58 Pac. 749.

organized under the railroad law) as such means of transportation are often necessary in that business, but such a corporation would not have the power of eminent domain.[11]

They shall set forth,[12]

First: "The name of the corporation."

The name of a corporation can not contain the words "trust" or "trustee" unless it shall be authorized by its Articles to act as trustee, executor, etc., nor shall it accept or execute any trust unless it is organized under the act of April 6, 1891, p. 490, and the amendments thereto found in Stats. 1897, p. 424; Stats. 1903, p. 244; Stats. 1905, p. 232; Stats. 1907, p. 562; and Stats. 1909, p. 300; Civil Code, section 290½. There is no statute requiring the name of a corporation to contain either of the words "company," "corporation," "incorporation," "association," "society," "syndicate," or "organization" as is required in so many states; but the name must not too closely resemble the name of any existing corporation in this state. See Civil Code, section 296, post.

The use of the word "bank" or other word indicating that it is a bank, savings bank, or trust company, where the corporation is not subject to the supervision of the superintendent of banks, is prohibited by sections 12 and 12a of the Banking Act of 1909, as amended in 1913. Also no banking corporation shall adopt or use the name of any friendly association. Code of Civil Procedure, section 1276.

CHANGE OF NAME

The method of changing the name of a corporation is provided in sections 1275 to 1279 of the Code of Civil

11 People v. Mount Shasta etc. Co., 107 Cal. 256, 40 Pac. 391.

12 Civil Code, sec. 290.

Procedure. Changing the name by amending the Articles, which is almost the universal method in the eastern states, is forbidden by section 362 of the Civil Code. In this state it can be done only by application to the superior court as in case of natural persons. The petition must be signed by a majority of the directors, stating the date of the formation of the corporation, its present name, the name proposed, and the reason for the change. The latter requirement is novel. Publication of notice of the hearing must be made for at least four weeks, and the corporation must file at the hearing a certificate of the secretary of state that the name desired is not the name of any other corporation, and that it does not so closely resemble the name of any other existing corporation as to tend to deceive. If the court enters a decree changing the name, a certified copy of the decree must be filed with the secretary of state within thirty days of the date of the decree. Section 300a of the Civil Code also requires a copy of the decree to be filed in the office of the county clerk of each county in which the original Articles, or certified copies of the Articles, are required by law to be filed.

In one case of this character[13] it was strangely contended that these provisions of the code were unconstitutional, as delegating legislative authority to the courts. The court decided against this claim, and held that these sections were applicable to all private corporations, and that the proceeding was a judicial one.

Only one more case of a corporation *changing* its name has reached our appellate courts.[14] There it was held that a publication begun on July 27 and ending

13 Matter of La Societe Francaise etc., 123 Cal. 525, 526, 56 Pac. 458, 787, cited in Title etc. Co. v. Kerrigan, 150 Cal. 289, 320, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 356.

14 In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

on August 23 complied with the full four weeks' publication required by the statute, and that the court had no discretion in the matter of ordering a hearing on the application, and formal findings of fact are not necessary if the recitals in the order are sufficient; and where it was sought to change the name from Los Angeles Trust Company to Los Angeles Trust and Savings Bank an allegation that the corporation proposed to do a savings bank business was a sufficient reason for the change of name, and that the proposed name does not so closely resemble "Los Angeles Savings Bank," the name of another corporation, as to tend to deceive, and that the word "Trust" sufficiently distinguishes it from the latter name.

NAME NOT TO BE DUPLICATE OF OR SIMILAR TO OTHERS

"The secretary of state shall not file any copy of the copy of any Articles, or issue any certificate of incorporation to any corporation, which Articles set forth the corporate name of any corporation heretofore organized in this state, or file any copy of any Articles, or issue any certificate of incorporation to any corporation existing at the time of filing said Articles, which Articles set forth a name so closely resembling the name of such corporation as will tend to deceive."[15]

The provision that one name shall not so closely resemble another as to "tend to deceive" is so general an expression that no rule can be set down as a guide. It depends entirely upon the personal view of the officer, or tribunal, having the right to decision. That rests primarily with the secretary of state. If he should refuse to file Articles for that reason, undoubtedly mandamus proceedings could be instituted to compel him to do so, when the question would be determined by a

[15] A proviso to section 296 of the Civil Code, which was added to the section by the act of 1901, p. 629.

court. This question has arisen often in New York and other eastern states and names differing only by one word like "railroad" or "railway" have been held unobjectionable, and so have our courts in a very recent case,[16] it being held that substituting the word "railroad" for "railway" was a sufficient difference, and it was further said that, the secretary of state having actually filed the Articles of the second corporation, he was not without authority to file the same, and that if it were erroneous for him to do so, the error did not render the incorporation illegal or void, nor *(dictum)* was it ground for forfeiture of the charter. But this was a case where the second corporation was taking over the business, property, and franchises of the first, in which class of cases this statute is most liberally construed.

As stated in the preceding paragraph, the names "Los Angeles Trust and Savings Bank" and "Los Angeles Bank" do not so closely resemble each other as to be objectionable.

A case arising between two corporations, and between one of the corporations and an individual, decided by our supreme court, sheds some light upon this question.[17] A stationery business was begun by one J. S. Dodge and after it had been successfully conducted for many years was incorporated by him under the name of the Dodge Stationery Company, but its signs and advertisements usually contained only the word "Dodge's." Later, J. S. Dodge sold his stock in this corporation, and still later organized a corporation under the name "J. S. Dodge Company," which at once engaged in the stationery business near the location of the former company; the latter corporation,

16 Vallejo etc. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; s. c. 18 Cal. App. Dec. 235, 245.

17 Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

however, used the word "Dodge's" as a sign and in its advertising.

The court enjoined the second corporation from using the word "Dodge's," and also from engaging in the stationery business. The decision was founded on the equitable grounds that neither the new company, nor J. S. Dodge individually, could use names so similar to that of the first company as to appropriate its reputation, good will, and trade. No mention of the above proviso to section 296 was made, presumably because the corporation was organized a few weeks before its passage, although the suit was brought long afterward.

In an early case[18] it was said of an organization doing business under the name of "Pacific Mutual Life Insurance Company of California," that the mere name under which it does business raises no presumption whatever that it is an incorporated company. But the addition of the letters "Inc." after the name of a company is equivalent to the words "a corporation."[19]

Second: "The purpose for which it is formed."

This subdivision will be considered under section 354 of the Civil Code.

Third: "The place where its principal business is to be transacted."

See constitutional provision, article 12, section 14.

Under this section it is the duty of a corporation to maintain a principal office and its failure to do so will not relieve it of penalties imposed by statutes concerning statements, etc., required to be posted there.[20] If the Articles designate a place in one county as its principal place of business but are not filed there, but are

18 Briggs v. McCullough, 36 Cal. 542, 550.

19 Goldberg, Bowen & Co. v. Dimick, 169 Cal. 187, 146 Pac. 672.

20 Chapman v. Doray, 89 Cal. 52, 54, 26 Pac. 605.

filed in some other county, the corporation never has any *de jure* existence.[21] A corporation's residence is the county where it has its principal place of business.[22] Under the old law which did not require a foreign corporation to have a fixed place of business within the state, it had no residence in the state.[23]

In a very early case, it was held that a failure to name a place as the "principal place of business" was a technical error which would not make the charter void, when the statement was made in the Articles that San Francisco was the place of business, which would imply that it was not only the principal place of business, but the only place of business.[24] But stating that the principal place of business was Calaveras County was too indefinite.[25]

The operations of a corporation may be carried on in one county and its principal place of business be in another. "The principal place of business contemplated and intended by the statute is the principal office of the corporation at which the books of the corporation are kept and its officers usually and ordinarily meet for the purpose of managing the affairs and transacting the business of the corporation, and the statute requires that the city or town, as the case may be, shall be stated in the certificate."[26] "The principal place of business, as stated in its Articles, is its residence; but as in the case of an individual, its actual place of business, its scenes of operations, the place where it buys

21 Martin v. Deetz, 102 Cal. 55, 64, 41 Am. St. Rep. 151, 36 Pac. 368.

22 Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

23 Thomas v. Placerville etc. Co., 65 Cal. 600, 4 Pac. 641.

24 Ex parte Spring Valley Waterworks, 17 Cal. 132, 136.

25 Harris v. McGregor, 29 Cal. 124, commented on as to such a corporation being a de facto corporation, Pacific Bank v. De Ro, 37 Cal. 538, 542.

26 Harris v. McGregor, 29 Cal. 124, 127-129.

and sells may be a county entirely different from its [principal] place of business."[27] The principal place of business is the residence of the corporation and one of the places where suit may be brought against it.[28] As to change of place of principal business, or the principal office, see cases cited under section 321a of the Civil Code, and as affecting the venue of actions see title, "Where a Corporation May Be Sued."

Fourth: "The term for which it is to exist, not exceeding fifty years."

Until the amendment to article 12, section 7, of the constitution adopted November 3, 1908, the period of existence of a corporation could not be extended, and when the period stated in its Articles expired it had to be wound up. Even since the amendment the period of existence of a quasi-public corporation can not be extended. Before this amendment to the constitution an act of the legislature (Stats. 1907, p. 344, amending Civil Code, sec. 401) providing a method for extending the life of a corporation was held unconstitutional.[29] There is no limitation in the constitution on the power of the legislature to authorize corporations to be created to exist for any length of time (although it once prohibited the extension of the franchise to exist); the limitation is found only in the provision above quoted from the Civil Code.

27 Creditors v. Consumers etc. Co., 98 Cal. 318, 33 Pac. 196.

28 Jenkins v. California etc. Co., 22 Cal. 537, 538; Cohn v. Central Pac. etc. Co., 71 Cal. 488, 489, 12 Pac. 498; Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

29 Boca Mill Co. v. Curry, 154 Cal. 326, 97 Pac. 1117. While the opinion in this case expressly states that it is not decided that Civil Code, sec. 401, providing for the extension of a charter to the full period of fifty years, where the charter was for a shorter period, is invalid, the reasoning of the court admits of no other result.

The section of the constitution above cited is self-executing and provides the method of making the extension; the act of 1907 above would not be revived by the above amendment to the constitution, and whether the old section 401 would be is subject to doubt, for when adopted the constitution prohibited the extension of any charter, therefore prudence would dictate that no method for extending the existence of a corporation be resorted to except the one provided in the above constitutional amendment.

Fifth: "Number of directors."

The number of its directors or trustees, which shall not be less than three, and the names and residences of those who are appointed for the first year, must be stated.

The number of directors can not be increased or diminished by amending the Articles; see last clause of section 362 of the Civil Code, post. This may be done under section 361 of the Civil Code, a new section enacted by the legislature in 1915.

The directors appointed in the Articles serve until the next annual election; the time of the annual election is to be fixed by the by-laws. It is error to elect new directors upon receiving a certificate from the secretary of state that the Articles have been duly filed and that the organization is a corporation, unless those appointed in the Articles resign. The supreme court, in a late case, said, "it is not to be supposed that the legislature intended that it [the corporation] should be an inert and lifeless body during the interim between its coming into existence and the time of holding its first annual meeting" and that the above provision of the Civil Code "taken in connection with the provision of section 302 of the Civil Code, that the directors are to be elected annually, and, in the absence of any by-law in reference thereto that such election must be held on the

first Tuesday in June, necessarily implies that in the interim between the organization of the corporation and the first election of directors, the corporate powers and authority of the corporation may be exercised by the directors named in the Articles of Incorporation"[30] and that a mortgage executed pursuant to a resolution of such a board was valid, so far as action by a board of directors was concerned.

Sixth: "The amount of its capital stock."

The first sentence of subdivision six of this section constituted the whole of it from 1872 until 1907, when the provision authorizing the division of stock into common and preferred shares was added. The last lines, being the proviso "that the preferred and common shares shall be of the same par value," were added in 1915.

The first clause of this section is so simple that no case of dispute or uncertainty concerning it has ever reached the appellate courts.

In a case which probably arose before the above amendment of 1915 was passed (but decided afterward) the court held, notwithstanding, that the secretary of state was warranted in refusing to file Articles of Incorporation which fixed different par values for the common and preferred shares.[30a] In view of the definition given to "capital stock" by our supreme court, and of the fact that subscriptions may not be paid while other sections of the statute give the subscriber the right to vote thereon and to give or withhold certain assents, and of the fact that shares may be issued though only partially paid, the principle announced in the case above cited, that the "fundamental right to vote is based upon ownership of the

[30] Middleton v. Arastraville etc. Co., 146 Cal. 219, 222, 79 Pac. 889.

[30a] Film Producers v. Jordan, 171 Cal. —; 154 Pac. 605.

capital stock as distinguished from shares . . . in proportion to their interest in the capital stock of the corporation," can not be applied without producing great confusion.

No other decisions concerning preferred and common stocks have been rendered by our higher courts.

This section contains two provisions, however, which are probably found in no other state; that is, that no distinction between these stocks can be made as to voting power under any circumstances, and that holders of preferred stock shall be liable to the creditors of the corporation the same as other stockholders.

As the foregoing are the only distinctions between common and preferred stocks which are forbidden, it is a fair, and probably a safe, inference that the preferred stock could be made non-assessable by the directors (as it has been decided that common stock may be) for the purpose of paying debts or of raising more capital for carrying on or enlarging the business.

It will also be observed that there is no minimum amount of capital required for the creation of the ordinary corporation, so that such a corporation may be formed for the smallest denomination of money existing. Nor is there any limitation on the amount of capital which may be created. As to certain other corporations, like railroads, trust companies, banks, etc., other sections of the statutes require at least a certain amount of stock to be subscribed at the time of organization, or before beginning business, but there are no such provisions as to what may be called ordinary corporations.

Neither is there any requirement as to the amount of the par value of the shares. Requirements as to par value of shares serve no beneficial purpose whatever, and in those states where they are made they have

been often found troublesome and annoying in the conduct of the business of the corporation.

Seventh: "If there is a capital stock, the amount actually subscribed, and by whom."

When a party made an agreement in contemplation of the organization of a corporation that he would take $25,000 of the stock, but in the Articles of Incorporation his name was put down as a subscriber for only $4000 of the stock, he making no subscription for stock after the corporation was organized, it was held that the preliminary agreement was not a subscription for $25,000 of the stock and the corporation could not assess him for the payment of more than $4000 of the stock. The court says further, which of course is *dictum:* "It is plain that the amounts subscribed, and by whom, must be set forth in the Articles of Incorporation. Those who sign and file the Articles, and thus bring the corporation into existence, act for the real subscribers."[31] But in later cases it has been held that a subscription for stock of a corporation in contemplation of its formation was good, whether there was or was not a showing as to what amount of subscription, if any at all by the party, was contained in the Articles.[32] And it is not necessary to the validity of the organization, or to the right of the subscribers to become stockholders, that they should all subscribe to the Articles of Incorporation.[33]

In the case of the incorporation of an insurance company, at a time when section 419 of the Civil Code required as a condition of the organization of such a

31 Monterey etc. R. Co. v. Hildreth, 53 Cal. 123.

32 Marysville etc. Co. v. Johnson, 93 Cal. 538-551, 27 Am. St. Rep. 215, 29 Pac. 126; s. c. 109 Cal. 192, 195, 50 Am. St. Rep. 34, 41 Pac. 1016.

33 San Joaquin etc. Co. v. Beecher, 101 Cal. 70, 79, 35 Pac. 349; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308.

company that $100,000 of stock be subscribed, the court said that, taking this section in connection with section 290 Civil Code, the Articles should show the actual amount subscribed and that the subscription equaled $100,000, and the Articles not showing these facts, "the persons signing the Articles did not form a corporation,"[34] but this was a *dictum*, for the suit was not against the corporation (but against individuals, probably connected with it), and a demurrer to the complaint of the people to restrain the corporation from doing business was sustained because the corporation had not been made a defendant. As section 290 stood in 1875, it did not contain the seventh clause of the present section (which was added, Stats. 1876, p. 70). And a corporation organized then was legal without containing such a statement.[35]

But at common law no stock subscription was necessary at the time of the creation of a corporation; the individuals named were constituted a corporation. With the exception of the special kinds of corporations named above, there is no statute in this state requiring what we have called ordinary corporations to have any specific amount of stock subscribed, if indeed any at all is required. But section 305 of the Civil Code requires that directors of corporations for profit must be holders of stock therein to an amount to be fixed by the by-laws, and the courts have said,[36] if "the by-laws of the corporation fixed no amount of stock to qualify a stockholder for election as director, still, under the provision of the code the director must be a stockholder." This, taken in connection with facts that a subscription to the stock makes a person a stockholder, and that no certificate of stock need be issued

[34] People v. Flint, 64 Cal. 49, 28 Pac. 495.

[35] People v. Leonard, 106 Cal. 302, 309, 39 Pac. 617.

[36] Rozecrans etc. Co. v. Morey, 111 Cal. 114, 116, 43 Pac. 585.

to make the subscriber a stockholder,[37] and that a subscription made in contemplation of the organization of a corporation may be enforced by the corporation after it is organized[38] doubtless puts the corporation in the position of being able to have stockholders the instant the copy of its Articles is filed by the secretary of state. Having stockholders at that instant it is in position to comply with the above provision of section 305, and it follows, reasonably, that the directors appointed for the first year must be subscribers to the stock, and probably for that reason that there should be subscriptions at least to that extent made at the time of executing the Articles. It should be borne in mind that all the cases cited are on questions of the annual election of directors, or assessments on subscribers, and not as to the original appointment of directors in the Articles.

AMENDING ARTICLES

Section 362 of the Civil Code, as amended in 1915, providing the method of amending Articles of Incorporation, reads as follows:

> **§ 362.** Any corporation organized under the laws of this state may amend its Articles of Incorporation for any or all of the following purposes:
>
> (1) To set forth a new name.
>
> (2) To alter or repeal any provision appearing in its original or amended Articles of Incorporation relative to the purposes for which the corporation is formed, or set forth, additional powers or purposes.

[37] Mitchell v. Beckman, 64 Cal. 117, 121, 28 Pac. 110; California etc. Co. v. Callender, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. 859; Pacific etc. Co. v. Coon, 107 Cal. 447, 452, 40 Pac. 542; Garretson v. Pacific etc. Co., 146 Cal. 184, 188, 79 Pac. 838.

[38] San Joaquin etc. Co. v. Beecher, 101 Cal. 70, 79, 35 Pac. 349; Tulare Sav. Bk. v. Talbot, 131 Cal. 45, 63 Pac. 172.

(3) To designate a principal place of business other than the place designated in its original or amended Articles of Incorporation.

(4) To state the date to which its existence has been extended.

(5) To state the number of its directors, as increased or diminished.

(6) To state the amount of its capital stock as increased or diminished and the number of shares and the par value thereof, or to change the number of shares and their par value or to provide for the classification of its capital stock into preferred and common shares, in which event there must be set forth a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted, also a clear and succinct statement of the nature and extent of the preference granted, and except as to the matters and things so stated, no distinction shall exist between said classes of stock or the owners thereof; provided, however, that no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation; and provided, further, that both the preferred and common shares shall be of the same par value.

7. To change the statement appearing in its original or amended Articles of Incorporation of the nature and extent of such preference, subject to the above limitations.

(8) And generally to provide for any other amendment not contrary to law.

The Articles of Incorporation may be amended as aforesaid by a majority vote of the board of directors of the corporation and by the vote or written assent of the holders of at least two-thirds of the subscribed capital stock of such corporation, or if the corporation has no capital stock then by a majority vote of its

board of directors and by the vote or written assent of a majority of the members. Upon the adoption of amended Articles of Incorporation, a copy of the Articles as thus amended shall be certified to as correct by the president and secretary and a majority of the directors of the corporation, and the corporate seal of such corporation shall be affixed to the certificate. Such certificate shall also set forth the proceedings by virtue of which the amended Articles were adopted, which proceedings must be in accordance with the provisions of this section above set forth.

The copy of amended Articles of Incorporation, thus certified, shall be filed in the office of the county clerk of the county in which the original Articles of Incorporation of such corporation were filed, and a copy thereof, certified by such county clerk, shall be filed in the office of the secretary of state, whereupon such corporation shall have the same powers, and the stockholders thereof shall thereafter be subject to the same liabilities, as if such amendment had been embraced in the original Articles of Incorporation. A copy of such copy, certified by the Secretary of State, shall be filed in the office of the county clerk of every county in which such corporation has or holds real property, except only the county in which the original Articles of Incorporation were filed.

Any corporation which shall amend its Articles of Incorporation and shall fail to file copies of its amended Articles, as required by the preceding sentence, shall be subject to the penalties and liabilities provided in section 299 for a failure of corporations to file copies of their Articles of Incorporation in the office of the county clerks of the counties in which they shall purchase, hold, or locate property.

Nothing contained in this section must be construed to cure or amend any defect existing in the original Articles of Incorporation, where such defect is of such character as to render such original Articles invalid. And it is hereby expressly provided that no corpora-

tion shall amend its Articles of Incorporation to alter the statements which appear in the original Articles, of the names and residences of the first directors or the statements which appear in such originals, of the amount of capital stock subscribed and by whom.

Nothing appearing herein shall be construed as permitting a corporation to change its name or its principal place of business, extend or reduce its term of existence, or increase or diminish its number of directors or its capital stock, by amending its Articles of Incorporation. (Stats. 1915, p. 1457.)

This amendment of 1915 clears out some absurdities in the old section, but adds fresh ones of its own, and also seems to be self-conflicting; the last sentence seems to be contradictory to some of the enumerated purposes for which amendments are permitted and, in view of the other sections of the statute, raises the inquiry why this section in its present form should exist at all. See forms for amending Articles for further consideration of this section.

It was expressly decided under the original section that no acknowledgment of amendments is required.[39] A complaint which alleges that none of the things required in the first paragraph, quoted above, were done shows that the proposed amendments were not legally adopted.[40]

An amendment can not be resorted to for the purpose of curing any defect in the original Articles which made such Articles invalid at the time of filing. No decisions have interpreted this clause. We may look to those decisions as to invalidity of the original Articles, already cited under that heading, for all the light there is yet on this question. This provision is

[39] Boca etc. Co. v. Sierra Valleys R. R. Co., 2 Cal. App. 546, 552, 84 Pac. 298.

[40] McDermont v. Anaheim etc. Co., 124 Cal. 112, 115, 56 Pac. 779.

far more restrictive and rigid than the laws of most other states on this subject, and its prohibition of amendments curing defects in the original Articles is felt severely by corporations which have been running a number of years; an entirely new organization being necessary, and troublesome and sometimes quite difficult transfers of property, rights, and franchises must be made to the new corporation; or the old corporation must be wound up, probably at much loss, for no corporation desires to take the risk of operating as a *de facto* corporation only. As such corporations, however, are at least *de facto* corporations; as no one can object but the state; as no rights of creditors are diminished; as no stockholders' liability is affected; as every person, stockholders and creditors included, having acted in good faith on the theory that the organization was a corporation and all rights and liabilities were created on that belief,—no substantial reason has ever been brought forward why such an amendment should not be made. The laws of most other states in the Union permit an amendment to the Articles which would cure any defect, however vital, in the original Articles.

Many of the eastern states, indeed almost all of them, permit Articles to be amended in all of the respects prohibited in the last clause of this section. No one but the corporation and its stockholders have any interest in the matters prohibited. It is wholly immaterial to the public how many directors the corporation has; or what the name of the corporation is; or whether the corporate existence is extended; or if its capital stock is increased; or, indeed, if it is diminished, for the liability of the stockholders remains the same notwithstanding; and under the sections providing for diminishing the capital stock even no existing creditor can object. No future creditor has the slightest interest in this matter, or in any of these matters. But it is quite

properly forbidden (in Civil Code, section 359, subdivision 5) to diminish the capital stock to an amount less than the indebtedness.

The methods provided in other sections for accomplishing these purposes are, nearly all, very cumbersome, technical, tedious, laborious, and expensive; all of which serves no useful purpose and is attended with liability to errors which sometimes result in great complications. Technicalities and a multitude of details protect no one, but promote litigation, which may be profitable to lawyers, but is often disastrous to the enterprise.

Amending Articles, by making part of the shares preferred and part common, without increasing or diminishing the total number of shares, or the par value thereof, is not an increase or decrease of the capital stock, in violation of sections 359 and 362 of the Civil Code, although such action might increase or diminish one of the classes of stock.[41]

If the validity of the meeting of stockholders at which the Articles were amended increasing the number of directors is doubtful, still, if the stockholders have long acquiesced therein, they are estopped from questioning the legality of the board on that account.[42]

A speedy way was found under the former section to accomplish the voluntary dissolution of a corporation, which was also easy and effective. This was done by amending the Articles of Incorporation, shortening the period of the corporation's existence to a near date in the future.[43] But that boon to countless corporations which have served their purposes, and are moribund,

41 California Telephone etc. Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

42 Chandler v. Hart, 161 Cal. 405, Ann Cas. 1913B, 1094, 119 Pac. 516.

43 Tognazzini v. Jordan, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879.

was taken away by the amendment of this section in 1915, and now even the most insignificant corporation must resort to the special method provided in the Code of Civil Procedure, sections 1227 to 1234, which is exceedingly cumbersome, tedious, and expensive.

The decision that the number of directors might be increased or diminished by a vote of a majority of the shares under section 290 of the Civil Code, unaffected by the provisions of this section,[44] is now made of no effect, for the reason that the provision of that section permitting this to be done was also left out of the amendment of that section in the act of 1915.

INCREASING OR DECREASING DIRECTORS

The legislature of 1915 adopted a new section of the Civil Code providing the method for these purposes. It is very simple and needs no comment.

Section 361 of the Civil Code is as follows:

> **§ 361.** Any corporation or association may increase or diminish the number of its directors or trustees by the vote or written assent of stockholders representing a majority of its subscribed capital stock, or, if it has no capital stock, by the vote or written assent of a majority of the members. A certificate over the corporate seal, setting forth the action taken by the stockholders, or members, and stating the new number of directors, shall be signed by the president and secretary of such corporation or association, and filed in the office of the county clerk of the county where its original Articles of Incorporation were filed, and a copy of said certificate, certified by such county clerk, shall be filed in the office of the secretary of state, whereupon the number of directors or trustees shall be changed as stated in said certificate. (Stats. 1915, p. 1456.)

[44] Bank of Los Banos v. Jordan, 167 Cal. 327, 139 Pac. 691.

EXTENDING CORPORATE EXISTENCE

Article 12, section 7, of the constitution is as follows:

§ 7. The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any quasi-public corporation now existing or which shall hereafter exist under the laws of this state.

The term of existence of any other corporation now or hereafter existing under the laws of this state, may be extended, at any time prior to the expiration of its corporate existence, for a period not exceeding fifty years from the date of such extension, by the vote or written consent of stockholders representing two-thirds of its capital stock or of two-thirds of the members thereof.

A certificate of such vote or consent shall be signed and sworn to by the president and secretary, and by a majority of the directors of the corporation and filed and certified in the manner and upon payment of fees required by law for filing and certifying Articles of Incorporation, and thereupon the term of the corporation shall be extended for the period specified in such certificate, and such corporation shall thereafter pay all annual or other fees required by law to be paid by corporations. (Amendment adopted November 3, 1908.)

§ 7. [Original section.] The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter, of any corporation now existing, or which shall hereafter exist, under the laws of this state.

Section 401 of the Civil Code is as follows:

§ 401. Every corporation formed for a period less than fifty years may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation.

Such extension may be made at any meeting of the stockholders or members called by the directors expressly for considering the subject if voted by stockholders representing two-thirds of the capital stock; or by two-thirds of the members; or may be made upon the written assent of two-thirds of the members or of stockholders representing two-thirds of the capital stock.

A certificate of the proceedings of the meeting upon such vote, or upon such assent, must be signed by the chairman and secretary of the meeting and a majority of the directors, and be filed in the office of the county clerk where the original Articles of Incorporation were filed, and a certified copy thereof in the office of the secretary of state, and thereupon the term of the corporation is extended for the specified period. (Amended March 21, 1905; Stats. 1905, p. 564.)

This section of the Civil Code is undoubtedly superseded by the section of the Constitution above.

Unless the franchise is granted upon a condition, the failure to perform which is to work a forfeiture, a corporation continues in existence until the state, by proper proceedings, procures an adjudication of forfeiture, and the confirmation by the legislature of franchises theretofore granted by a city (the city not having the power to grant franchises) to a corporation, is not forbidden by the constitutional provision above; it is not an attempt to extend any franchise or charter nor the remission of a forfeiture, for no forfeiture has occurred.[45]

Section 401 of the code above existed about seven years before the original of the above constitutional

[45] People v. Los Angeles etc. Co., 91 Cal. 338, 340, 27 Pac. 673; distinguished in Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 646, 28 Pac. 676.

section was adopted. During that interval that code section was not in conflict with any constitutional provision and a corporation could extend its existence thereunder.[46]

The legislature attempted to amend section 401 above by act of March 18, 1907, page 344, granting corporations the power to extend their existence for the period of fifty years upon their taking certain proceedings set out in the amendment. This amendment was held to be in violation of the above constitutional provision.[47] Whether the original section 401, quoted above, continued in force after the Constitution of 1879 went into effect was not decided, but it was hinted that it might do so under the doctrine of Board of Commissioners v. Board of Trustees, 71 Cal. 310, 12 Pac. 224. The reasoning of the latter case is not conclusive; hardly persuasive.

The reasons set out in the Boca Mill case, *supra*, if admitted, make the conclusion irresistible that until the constitutional amendment of 1908, set out above, was passed, there was no power existing anywhere to extend the period of existence of a corporation.

If section 401 was made invalid by the adoption of the Constitution of 1879, being valid however when enacted, a question might arise whether it was not revived by the adoption of the constitutional amendment of 1908;[48] but the act of 1907 being void when enacted could not be revived because it never had life. In any event there seems now little use for either of these sections, the provisions of the constitutional amendment being ample.

[46] People v. Auburn etc. Co., 122 Cal. 335, 55 Pac. 10.

[47] Boca Mill Co. v. Curry, 154 Cal. 326-340, 97 Pac. 1117.

[48] In analogy to the street improvement law of Los Angeles.

CHANGE OF PRINCIPAL PLACE OF BUSINESS

Section 321a of the Civil Code is as follows:

> **§ 321a.** Every corporation that has been or may be created under the general laws of this state may change its principal place of business from one place to another in the same county, or from one city or county to another city or county within this state.
>
> Before such change is made, the consent, in writing, of the holders of two-thirds of the capital stock of the corporation must be obtained and filed in its office.
>
> When such consent is obtained and filed, notice of the intended removal or change must be published, at least once a week, for three successive weeks, in some newspaper published in the county, wherein said principal place of business is situated, if there is one published therein; if not, in a newspaper of an adjoining county, giving the name of the county or city where it is situated and that to which it is intended to remove it.
>
> Whenever any such change is made, a copy of the resolution or action of the board of directors authorizing the same, together with a copy of an affidavit of the publication above required, all duly certified by the president and secretary of the corporation with the corporate seal affixed, shall be filed in each office where the original Articles of Incorporation are, or any copy thereof is required to be filed.
>
> This section shall not be construed to require such consent, notice or publication in the case of any such removal from one location to another in the same city, town or village. (As amended March 20, 1903; Stats. 1903, p. 254.)

There seems to be a general impression that nothing more than a resolution, as in case of a change from one place to another in the same city, town, or village, is necessary to change from one place in a county to another place in the same county. The latter change requires the same formalities as a change from one county to another.

Thus far there is only one decision under this section, and that is that action by the board of directors is all that is required in order to move the "office," even if that be treated as equivalent to the "principal place of business," from one location to another in the same city, and that the requirements of this section in regard to consent of stockholders, notice, and publication do not apply to such a case.[49]

Notice of this change of the place of the office was duly given to all the directors; therefore they had notice of the place of all subsequent meetings.

TRUST COMPANIES

Stock subscriptions required.

Section 290a of the Civil Code makes elaborate provisions on this subject; but, as the section is of great length, and the matter is of limited interest, the reader is referred to the statute itself for particulars.

The words "trust" and "trustee" not to be used in name unless organized under those laws.

Section 290½ of the Civil Code reads as follows:

> § 290½. No corporation hereafter formed shall use the word "trust" or "trustee" as part of its corporate name unless it shall be authorized by its Articles of Incorporation to act as executor, administrator, guardian, assignee, receiver, depositary or trustee, nor shall any corporation hereafter formed accept or execute any trust unless it shall have complied with all the provisions of "An act authorizing certain corporations to act as executor, and in other capacities, and to provide for and regulate the administration of trusts by such corporation," approved April 1st, 1891, and the amendment thereto approved April 1, 1897. (Stats. 1905, p. 251.)

[49] Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 628, 120 Pac. 15.

And the Act of March 18, 1905, section 23, (Stats. 1905, p. 232) is:

> § 23. The use of the word "trust" in combination or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization," or "syndicate" is hereby prohibited to all persons, firms, associations, companies or corporations, other than corporations provided for by a certain act of the legislature entitled "an act authorizing certain corporations to act as executor and in other capacities and to provide for and regulate the administration of trusts by such corporations," approved April 6, 1891, and any person, firm, association, company or corporation which uses the word "trust" in combination with or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization" or "syndicate" as the name under which business is done or transacted, shall be subject to the provisions of the act last referred to and to the supervision of the bank commissioners, as required by said act.
>
> Any person, firm, association, company or corporation making use of the word "trust" in combination or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization" or "syndicate" in the manner hereinabove mentioned in the transaction of business and not subject to the provisions of said act and the supervision of the bank commissioners as in said act provided shall forfeit for each day the offense is committed, the sum of one hundred dollars, to be recovered by the bank commissioners of the state of California in the manner provided by law.

DISSOLUTION

An entirely new section, providing a special method for the dissolution of trust companies, added to the Code of Civil Procedure as section 1235, was passed in

1915. It is too long to be inserted here, and the statute itself is referred to for details.

RAILROAD COMPANIES

Sections 291, 293, 294, and 295 of the Civil Code pertain to railroad, wagon road, and telegraph companies and not being of general interest reference only to the sections is made.

SUBSCRIBING AND ACKNOWLEDGING ARTICLES

Section 292 of the Civil Code provides that

> The Articles of Incorporation must be subscribed by three or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments or conveyances of real property.
>
> The signature of each person named in said Articles of Incorporation as directors of such corporation shall be affixed to said Articles of Incorporation and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property. (Stats. 1911, p. 1112.)

This amendment of 1911 (the second clause above) requires all persons who are named as directors for the first year to sign and acknowledge the Articles, which had not been necessary theretofore. The decisions cited below were rendered under the law as it formerly stood, which fact should not be lost sight of when considering them.

Where Articles were signed by a sufficient number of persons but acknowledged by less than the sufficient number, the Articles are fatally defective as against the state in *quo warranto* proceedings to dissolve the corporation; a proper acknowledgment is a condition

precedent to a *de jure* organization,[50] although as to all other persons the organization would be a *de facto* corporation.

In two later cases involving the organization of corporations for social purposes, it was held that this section of the code applied also to the organization of such corporations, and the failure of the necessary number to acknowledge the Articles was fatal to the validity of the incorporation.[51] The first case cited was in *quo warranto* by the state, but the second was between private parties claiming to be interested in the affairs of the pretended corporation, the court holding that it was not a *de jure* corporation, because the Articles were not acknowledged by the required number of persons, and that it was not a *de facto* corporation for other reasons, and therefore a deed of property to it passed no title, and that no trust arose in favor of the persons composing the pretended corporation.

In a case where a corporation was amending its Articles, the officer's certificate of amendment omitted a copy of the acknowledgment of the original Articles; the omission was held immaterial on the ground that the acknowledgment is no part of the Articles.[52] But the latter statement, that the acknowledgment is no part of the Articles was not necessary to a decision of the case, and is not in harmony with the two cases cited above, which hold that unless acknowledged they are not legal Articles and do not make a corporation a *de jure* corporation. The record in this case shows

50 People v. Montecito etc. Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

51 People v. Golden Gate Lodge, 128 Cal. 257, 263, 60 Pac. 865; Wall v. Mines, 130 Cal. 27-40, 62 Pac. 386.

52 California Telephone etc. Co. v. Jordan, 19 Cal. App. 536, 540, 126 Pac. 598.

that neither were the original Articles, without the acknowledgment, contained (as might be inferred from some expressions in the opinion) in the official certificate of the amendment Articles. There is no statutory requirement, or reason, requiring the original Articles to be set out in the amendment; the amendment should set out the entire Articles as amended.

FILING THE ARTICLES; NAME; EVIDENCE, ETC.

Section 296 of the Civil Code reads as follows:

> § 296. Upon filing the Articles of Incorporation in the office of the county clerk of the county in which the principal business of the company is to be transacted, and a copy thereof certified by the county clerk with the secretary of state, and the affidavit mentioned in the last section where such affidavit is required, the secretary of state must issue to the corporation, over the great seal of the state, a certificate that a copy of the Articles containing the required statement of facts has been filed in his office.
>
> And thereupon the persons signing the Articles and their associates and successors shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is, in the Articles of Incorporation, otherwise stated, or in this code otherwise specially provided;
>
> Provided, however, that the secretary of state shall not file any copy of the copy of any articles, or issue any certificate of incorporation to any corporation, which articles set forth the corporate name of any corporation heretofore organized in this state, or file any copy of any articles, or issue any certificate of incorporation to any corporation existing at the time of filing said articles, which articles set forth a name so closely resembling the name of such corporation as will tend to deceive.

> The secretary of state shall issue and file in his office a duplicate of the certificate hereinabove provided for and copies thereof, duly certified by the secretary of state, shall have the same force and effect in evidence as the original. (Stats. 1915, p. 1039.)

The amendment of 1915 changed this section only by adding the last sentence.

The affidavit referred to in the above section is applicable only to railroad, telegraph, and wagon road corporations, and has no application to ordinary corporations for profit.

The law requiring the Articles to be first filed with the county clerk of the county where the corporation proposes to have its principal place of business, and thereafter a copy with the secretary of state, seems to be a reversal of the proper order. If the secretary of state takes exception to the manner of their execution, or to their contents, as he may do, and a correction or new Articles have to be made, as frequently occurs, two or more sets of Articles will be recorded with the county clerk, causing possible uncertainty and confusion to those searching the records to ascertain facts which should be disclosed by the record. The reverse order would be simpler and better in every respect. If the corporation failed to file a copy of its Articles in the county clerk's office where it is to have its principal place of business, the same consequences could be made to follow, as now, when it changes its principal place of business, or purchases or holds property in some other county.

Also the county clerk should be required to record the Articles, and all amendments thereto, for by simply keeping them in file cases, as is now done, they are often misplaced, removed, or lost; these are the original papers and the most valuable of all.

If the Articles are not filed with the secretary of state the associates never become a corporation,[53] and when the Articles are not filed in the county where the principal place is fixed but in another county, the organization never becomes a corporation *de jure*,[54] and if an amendment to Articles is not filed with the secretary of state it is a nullity.[55]

Where the Articles were actually delivered to the county clerk, who was *ex officio* county recorder, who filed them in the recorder's office, who as recorder made a certified copy thereof which was filed with the secretary of state, who issued the usual certificate of incorporation, it was held that this was a substantial compliance with the law, and the organization of the corporation could not be collaterally attacked in a suit by the corporation to quiet title to some of its property.[56]

SIMILARITY OF NAMES

In regard to the prohibition of a corporation taking a name so like the name of a corporation already existing as will "tend to deceive," see Civil Code 289, ante, and cases there cited.

ARTICLES TO BE FILED IN OTHER COUNTIES

Section 299 of the Civil Code requires the Articles of domestic corporations (as also does section 362 of the Civil Code as to amendments to the Articles, and section 408 of the Civil Code as to originals and amend-

53 People v. Golden Gate Lodge, 128 Cal. 257, 262, 60 Pac. 865 (dictum).

54 Martin v. Deetz, 102 Cal. 55, 64, 41 Am. St. Rep. 151, 36 Pac. 368.

55 Boca etc. Co. v. Sierra Valleys etc. Co., 2 Cal. App. 546, 554, 84 Pac. 298.

56 San Diego etc. Co. v. Frame, 137 Cal. 441, 70 Pac. 295; Bakersfield etc. Ass'n v. Chester, 55 Cal. 98.

ments of articles of foreign corporations) to be filed in certain other counties, and is as follows:

§ 299. No corporation hereafter formed must purchase, locate, or hold property, in any county in this state, other than the county in which its original Articles of Incorporation are filed, without filing a copy of the copy of its Articles of Incorporation filed in the office of the secretary of state, duly certified by such secretary of state, in the office of the county clerk of the county in which such property is situated, within sixty days after such purchase or location is made.

Every corporation now in existence, whether formed under the provisions of this code or not, must, within ninety days after the passage of this section, file such certified copy of the copy of its Articles of Incorporation in the office of the county clerk of every county in this state in which it holds any property, except the county where the original Articles of Incorporation are filed; and if any corporation hereafter acquires any property in a county other than that in which it now holds property, it must, within ninety days thereafter, file with the clerk of such county such certified copy of the copy of its Articles of Incorporation.

The copies filed with the several county clerks, and certified copies thereof, have the same force and effect in evidence as the originals.

Any corporation failing to comply with the provisions of this section can not maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such Articles of Incorporation, and such certified copy of its Articles of Incorporation, and such certified copy of the copy of its Articles of Incorporation, are filed at the places directed by the general law and this section;

Provided, that all corporations are liable in damages for any and all loss that may arise by the failure of such corporation to perform any of the foregoing duties within the time mentioned in this section; and

provided further, that the said damages may be recovered in an action brought in any court of this state of competent jurisdiction, by any party or parties suffering the same. (Amendment approved March 21, 1905.)

The copy of the Articles to be filed in such other county is a certified copy of the certified copy filed with the secretary of state.[57]

In some other states, having a similar law as to foreign corporations, it has been held that prohibiting them defending an action is restraining them while a plaintiff despoils them, and is unconstitutional, and it has been so intimated in this state. See Foreign Corporations.

Where the corporation was organized before section 299 was adopted (in 1872) and it acquired the land before that time it was not necessary to file its Articles in such other county where the land lay,[58] in order to bring a suit to quiet title to the land, and the same was held as to a religious corporation[58] defending a suit for work and labor done for it.

The prohibition extends only to actions brought "in relation to such property, its rents, issues, or profits"; it does not prohibit defending an action to recover for work and labor done at the request of the corporation upon the property.[59]

It has been repeatedly decided that section 299 does not prohibit the commencement of an action until after the Articles are filed in such other county; it simply prohibits maintaining such an action, and that main-

[57] California Savings etc. Soc. v. Harris, 111 Cal. 133-135, 43 Pac. 525.

[58] San Diego etc. Co. v. Frame, 148 Cal. 252, 82 Pac. 1049; Mora v. Murphy, 83 Cal. 12, 17, 23 Pac. 63; and was inapplicable to a foreign corporation before the law was passed requiring such corporations to file their Articles in this state, South Yuba etc. Co. v. Rosa, 80 Cal. 333, 336, 22 Pac. 222.

[59] Weeks v. Garibaldi S. G. M. Co., 73 Cal. 599, 601, 15 Pac. 302.

taining an action does not mean the same in this connection as commencing an action, but implies that the action has already been commenced. If the Articles are filed before the objection is raised in the pleadings it is done in ample time. The objection is one of defense[60] and must be raised by plea in abatement, and be an existing fact at the time the plea in abatement is filed, and the rule is the same as to foreign as to domestic corporations;[60] nor is it necessary in a complaint to allege that the Articles have been so filed,[60] and denying the existence of the corporation is not supported by showing its Articles were not so filed.[61] Nor can the objection be raised for the first time upon appeal.[62]

This section does not forbid corporations failing to comply with its provisions from acquiring property, either by purchase or condemnation, but it does prohibit them maintaining or defending actions in relation to the property they have acquired;[63] the prohibition is as to actions concerning property which it holds, the holding of property being said to be radically different from the attempt to acquire a holding.[64] But the law is different as to foreign corporations. See amendment to section 410 of the Civil Code, post.

60 Ward Land etc. Co. v. Mapes, 147 Cal. 747, 752, 82 Pac. 426; California Sav. etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; Ontario etc. Bank v. Tibbits, 80 Cal. 68, 69, 22 Pac. 66; Southern Pac. etc. Co. v. Purcell, 77 Cal. 69, 72, 18 Pac. 886; Nicholson v. Auburn etc. Co., 6 Cal. App. 547, 548, 92 Pac. 651; Riverdale etc. Co. v. Wicks, 14 Cal. App. 526, 112 Pac. 896.

61 Southern Pacific etc. Co. v. Purcell, 77 Cal. 69, 72, 18 Pac. 886; Ontario etc. Bank v. Tibbits, 80 Cal. 68, 70, 22 Pac. 66.

62 Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 274, 32 Pac. 231.

63 Emigrant Ditch Co. v. Webber, 108 Cal. 88, 91, 40 Pac. 1061.

64 Ibid, and Savings etc. Soc. v. McKoon, 120 Cal. 177, 181, 52 Pac. 305.

A failure to comply with this section does not impose upon the corporation a loss or forfeiture of its property so located, or for all time impair or deprive it of any cause of action or defense it may have in reference to such property; this defense is available only until the statute has been complied with; it must be set up before it makes such compliance.[65]

It is held that this section does not apply to taking a mortgage upon real property in such other county, nor to a suit to foreclose such mortgage. The courts say statutes imposing penalties or creating forfeitures must be strictly construed, that every intendment is against enforcing statutory penalties and forfeitures, and that a mortgage is now no longer a conveyance, except in form, and passes no estate in the land.[66] This case was affirmed in a recent case where a foreign corporation took a mortgage in such other county and brought suit to foreclose it.[67] The court said the statute on this subject as to foreign corporations did not permit them to do business on more favorable terms than those imposed on a domestic corporation.

See next chapter on Powers of Corporations.

FILED IN WRONG COUNTY—HOW CORRECTED

Section 363 of the Civil Code provides that when the Articles have not been filed in the county which contains the corporation's principal place of business, but

65 California Sav. etc. Soc. v. Harris, 111 Cal. 133, 136, 43 Pac. 525, approving First Nat. Bank v. Henderson, 101 Cal. 307, 35 Pac. 899, and disapproving the expression in Byers v. Bourret, 64 Cal. 73, 28 Pac. 61, to the contrary; Riverdale Min. Co. v. Wicks, 14 Cal. App. 526, 112 Pac. 896.

66 Savings etc. Soc. v. McKoon, 120 Cal. 177, 179, 52 Pac. 305; distinguishing certain cases cited in the previous notes, which were foreclosure proceedings, stating that the pleas in abatement were the only questions decided.

67 Anglo-California Bank v. Field, 146 Cal. 644, 649-651, 80 Pac. 1080.

by mistake in another county, and the secretary of state shall have, notwithstanding, issued his certificate, any stockholder or director may petition the superior court in the county where the Articles are filed to have them withdrawn from the files, which permission being granted, they must, within ten days, be filed in the county where the principal place of business of the corporation is located. It will be noted that this can not be done if the secretary has not already issued his certificate to the corporation. That this error should escape the scrutiny of all the parties concerned, and also of the secretary of state who is very watchful of all details as well as of all the contents of Articles, suggests the belief that this section was adopted (in 1889) to relieve some particular case. This section should have provided for such withdrawal without regard to whether the certificate had been issued by the secretary of state, for error in filing by the parties is not infrequent, the secretary of state rejecting the papers for that reason, and the originals being so erroneously filed and not being withdrawable by any procedure, the parties must make a new organization.

LEGISLATURE MAY AMEND LAWS AND DISSOLVE CORPORATIONS

Section 404 of the Civil Code provides that

> The legislature may at any time amend or repeal this part [of the code], or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.[68]

[68] A section identical with this was added to the code in 1891 by the code commissioners, but the whole work of these commissioners was declared unconstitutional in Lewis v. Dunne, 134 Cal. 291, 86 Am. St. Rep. 257, 55 L. R. A. 833, 66 Pac. 478, and the present section was enacted in 1905.

There have been no decisions under this particular section, but it is only an elaboration of the provision of Article 12, section 1 of the constitution, to which reference is made for the decisions thereunder.

Of course, by reason of other provisions of the constitution, the legislature would have no power to pass any act affecting any particular corporation, for that would be special legislation which is forbidden. Whatever it may do of this nature must be by general laws affecting all corporations, or at least all corporations of a class, alike. No exercise of these powers has been attempted by the legislature except in reference to taxation, and declaring the existence of corporations which do not pay the tax at an end.

By section 403, preceding the above, it is provided that

> The provisions of this title are applicable to any corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this title, in which case the special provision prevails.[69]

ARTICLES DESTROYED BY FIRE

Whenever the Articles of Incorporation have been "destroyed by conflagration or other public calamity" section 297a of the Civil Code provides for filing copies, and Stats. 1906, p. 71, for copies of certificates for the same reason.

COPY OF ARTICLES—EVIDENCE

Section 297 of the Civil Code is as follows:

> **§ 297.** A copy of any Articles of Incorporation filed in pursuance of this chapter, and certified by the secre-

[69] Brief comment is made on this section in Market St. Ry. Co. v. Hellman, 109 Cal. 571, 582, 42 Pac. 225, and People v. Auburn etc. Co., 122 Cal. 335, 339, 55 Pac. 10.

> tary of state, or by the county clerk of the county where the original Articles shall have been filed, must be received in all courts of this state, and other places, as prima facie evidence of the facts therein stated.

And section 299 of the Civil Code declares that the copies filed with the several county clerks, and certified copies thereof, shall have the same force and effect in evidence as the originals.

An allegation that the plaintiff is a corporation is indispensable in all suits brought by it, and it follows that the defendant may deny it,[70] but this must be taken in connection with the fact that a *de facto* existence is sufficient under the later decisions cited under collateral attack.

In a very early case, under a former statute in substance the same as these sections, it was held that a copy of the certificate filed with the county clerk was sufficient to prove the existence of the corporation,[71] but this decision and these statutes seem to lose sight of the fact that under section 296 of the Civil Code the corporation does not come into existence until a copy of the Articles has been filed with the secretary of state and he has issued his certificate.

The original Articles filed with the county clerk, bearing his filing memorandum thereon, are also sufficient "evidence of the proper filing of such Articles and the due incorporation" of the corporation[72] as between the corporation and parties contracting with it.

Where a copy of the Articles, certified by the secretary of state, has been filed in the county where the original Articles were filed (which was not necessary) it could still be used as evidence, such unnecessary

70 Oroville etc. Co. v. Supervisors Plumas County, 37 Cal. 354.

71 Mokelumne etc. Co. v. Woodbury, 14 Cal. 424, 425, 73 Am. Dec. 658.

72 Sierra Land etc. Co. v. Bricker, 3 Cal. App. 190-191, 85 Pac. 665.

filing did not affect its character as evidence, and such a certified copy is not in any sense secondary evidence, but is made by law equal in all respects with the original as evidence.[73] A certified copy of the certified copy filed with the secretary of state is admissible as such evidence;[74] but it is only *prima facie* evidence.[75]

The existence of a corporation formed under the general corporation laws of this state is proved by its Articles of association or incorporation, executed and filed in accordance with the statute. A strict literal compliance with all the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions.[76] It is not necessary to prove a meeting following the filing of the Articles and the election of officers. But the effect of the certificate by the secretary of state can be overthrown by showing that the Articles were not duly executed.[77] For further cases related to this point see subjects of De Facto Corporations and Collateral Attack.

73 Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 487, 8 Pac. 22.

74 Fresno Canal etc. Co. v. Warner, 72 Cal. 379, 14 Pac. 37.

75 Boca etc. Co. v. Sierra etc. Co., 2 Cal. App. 546, 556, 84 Pac. 298.

76 Spring Valley etc. Works v. San Francisco, 22 Cal. 434, 440; Oroville etc. Co. v. Supervisors Plumas Co., 37 Cal. 354, 361; Martin v. Deetz, 102 Cal. 65, 41 Am. St. Rep. 151, 36 Pac. 368; San Diego etc. Co. v. Frame, 137 Cal. 441, 444, 70 Pac. 295; Los Angeles etc. Band v. Spires, 126 Cal. 541, 545, 58 Pac. 1049; Creditors' Union etc. Co. v. Lundy, 16 Cal. App. 567, 570, 117 Pac. 624.

77 Wall v. Mines, 130 Cal. 27, 39, 62 Pac. 386. If it is lost or destroyed, its contents may be proved by secondary evidence, Creditors' Union v. Lundy, 16 Cal. App. 567, 570, 117 Pac. 624.

CHAPTER III

TO ORGANIZE WITHIN ONE YEAR—CEASING TO DO BUSINESS—COLLATERAL ATTACK

Section 358 of the Civil Code reads as follows:

§ 358. If a corporation does not organize and commence the transaction of its business, or the construction of its works within one year from the date of its incorporation,

Or if, after its organization and commencement of its business, it shall lose or dispose of all its property, and shall fail for a period of two years to elect officers and transact, in regular order, the business of said corporation, its corporate powers shall cease,

And the said corporation may be dissolved at the instance of any creditor of the said corporation, at the suit of the state, on the information of the attorney-general;

But the resumption of its business in good faith by such corporation prior to the commencement thereof shall be a bar to such suit.

The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general;

Provided, however, as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as a corporation, no such inquiry shall be made either by the state or by any person whatsoever.

FORFEITURE

There is a very marked difference in nature between the forfeiture of the right to be a corporation, the franchise to exist, and forfeiture of franchises afterwards granted to a corporation to construct and operate something for the service, convenience, or well being of the public. In the former the public and the state have but the slightest interest, in general it may be said none at all; in the latter they have a great, often a vital interest. In all decisions as to forfeitures of franchises this distinction should not be lost sight of, as it often is.

Lying at the very base of all questions of this character is the rule at common law that a forfeiture does not operate to divest the corporation of the right until in a suit instituted for that purpose the rights of the state have been established.[1]

MUST ORGANIZE WITHIN ONE YEAR

Organization, as our present law stands, must be made within one year, and consists of the meeting of the directors appointed in the Articles for the first year and electing officers, and the adoption of by-laws, which must be done by the stockholders in meeting or by the written assent of two-thirds of the stock without a meeting. The requirement of Civil Code, section 301, that by-laws be adopted within one month after filing the Articles, if not done within that time, would not work a forfeiture of the franchise to exist, for no such forfeiture is declared.

The only two cases where the corporation failed to organize, as distinguished from defectively proceeding in the matter of organization, were where the directors

1 Oakland R. R. Co. v. Oakland etc. Co., 45 Cal. 365, 13 Am. Rep. 181; also as to the power of such a corporation to assign a part of such franchises; Arcata v. Arcata etc. R. R. Co., 92 Cal. 639, 646, 28 Pac. 676.

named in the Articles for the first year never met or acted, but deliberately refused to do so, no stock was issued and no officers were elected, etc. The court said there was never either any *de jure* or *de facto* corporation, and the claim of the existence of either could be disputed collaterally by a private person in any suit.[2] This decision can hardly be harmonized with other decisions involving *de facto* corporations..

In all *quo warranto* cases brought upon this ground some compliance, defective though it often was, was shown and the corporations suffered no forfeiture of their franchise to exist,[3] and we have not found any case where a suit was brought by a creditor to have the corporate franchise forfeited for any of the foregoing reasons. As already said, these cases must be distinguished from those where corporations were declared to have forfeited other franchises. See section 803 of the Code of Civil Procedure and comments, for further consideration of forfeiture of franchises and suits to have same so declared; also subtitle "Failure to Organize" discussed under that section.

CEASING TO DO BUSINESS

"A corporation once formed and organized according to law does not become dissolved or cease to exist

[2] Martin v. Deets, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368. Exactly the same state of facts existing, a like decision was made in Wall v. Miners, 130 Cal. 27, 37, 62 Pac. 386, and the same rule applies to an individual assuming the form of a corporation in conducting a business, People v. Volcano Canyon etc. Co., 100 Cal. 87, 34 Pac. 522.

[3] People v. Rosenstein etc. Co., 131 Cal. 153, 63 Pac. 163; People v. Montecito etc. Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172, and note; People v. Linda Vista etc. Co., 128 Cal. 477, 484, 61 Pac. 80, and cases cited; People v. Stockton etc. Co., 45 Cal. 306, 13 Am. Rep. 178. In People v. Rosenstein, supra, it was said minute books showing resolutions of directors and other matters, the adoption of by-laws, etc., tended to show that the corporation had commenced business.

merely because of a failure to transact business. Its term of life is prescribed by law, and only at the instance of the state can its existence in the meantime be questioned. This rule applies also to a *de facto* corporation.'"[4]

COLLATERAL ATTACK ON ORGANIZATION

Irregularities in the organization, or omission of acts required for that purpose, can not be raised to defeat a suit by the corporation to maintain or defend its rights. All that is necessary to put the corporation in safe position against such an attack is that it have attempted to carry out its organization, or even its incorporation, and is acting in good faith along those lines, holding meetings, and pursuing corporate forms.[5] Nor can the right of a foreign corporation to do business in this state be raised as a defense against proceedings taken by it in eminent domain.[6] A certificate of incorporation of a company claiming in good faith to be a corporation under the laws of this state and doing business, although not acknowledged by all the incorporators, is admissible in evidence to prove that it at least was a *de facto* corporation.[7]

An abortive attempt to organize a corporation does

[4] San Diego Gas Co. v. Frame, 137 Cal. 441-445, 70 Pac. 295, and distinguishing Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; Robinson v. Blood, 151 Cal. 504-508, 91 Pac. 258.

[5] Los Angeles Holiness Band v. Spires, 126 Cal. 541, 545, 58 Pac. 1049; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 185-186, 22 Pac. 76, and numerous cases cited in each; Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184, 23 Pac. 45.

[6] Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100.

[7] Dannebroge etc. M. Co. v. Allment, 26 Cal. 286; cited in a foreign corporation case, People v. Frank, 28 Cal. 507-519, and in People v. Oldham, 111 Cal. 648, 651, 44 Pac. 312, and in Pacific Bank v. De Ro, 37 Cal. 538.

not necessarily result in a partnership or a joint stock company.[8] Under the later decisions it usually results in a *de facto* corporation.

In a criminal case, a charge of forging a check of a corporation, it was said that the existence of a *de facto* corporation could not be proved by direct testimony that it was such, but that it could be proved by reputation.[9] But in civil cases it is always proved by its course of business, and it would seem that this ought to be the better proof even in a criminal case.

If the corporation claims in good faith to be legally incorporated and is doing business, it is sufficient. Deeds of land to it for its corporate purposes, plans of work done (on its railroad), judgments of condemnation of land for its use, etc., are proper evidence that it is a *de facto* corporation acting in good faith.[10]

"A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious."[11]

8 Blanchard v. Kaull, 44 Cal. 440, 450, 451.

9 People v. Dole, 122 Cal. 486-497, 68 Am. St. Rep. 50, 55 Pac. 253.

10 Vallejo etc. Co. v. Reed etc. Co., 169 Cal. 545, 147 Pac. 238.

11 People v. La Rue, 67 Cal. 526-530, 8 Pac. 84; quoted with approval in First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60, and People v. Montecito etc. Co., 97 Cal. 277, 33 Am. St. Rep. 172, 32 Pac. 236. Cited on point that legality of organization can not be inquired into collaterally, People v. Linda Vista etc. Co., 128 Cal. 471, 484, 61 Pac. 86; People's Ditch Co. v. 76 Land etc. Co., 5 Cal. Unrep. 292, 44 Pac. 176. See Creditors' Union v. Lundy, 16 Cal. App. 567, 571, 117 Pac. 624; McPhee v. Reclamation Dist., 161 Cal. 566, 119 Pac. 1077.

A direct proceeding by the state is the only proceeding by which a *de facto* corporation can be deprived of its franchise to exist or of its property.[12]

It was also said in one case that its recognition in the community as a corporation is a factor in the proof of the existence of a *de facto* corporation[13] and in another that a written receipt for money paid in a transaction showing that one of the parties was a corporation is evidence between the parties that the organization was a corporation;[14] and that a mere trespasser can not raise this question, the *de facto* existence having been shown.[15]

A party who has had the benefit of a contract with a corporation can not question either its *de jure* or *de facto* existence. Such a denial in a pleading raises no material issue;[16] nor will he be allowed to raise questions as to the contracts being in restraint of trade and against public policy in regard to matters not involved,[17] and the trustees who signed the Articles of Incorporation are themselves estopped from denying the validity of its incorporation.[18]

12 Los Angeles Holiness Band v. Spires, 126 Cal. 541-545, 58 Pac. 1049, and cases cited therein, and generally all cases cited under this head of "Collateral Attack."

13 Lake Side Ditch Co. v. Crane, 80 Cal. 181, 186, 22 Pac. 76.

14 Sierra Land etc. Co. v. Bricker, 3 Cal. App. 190, 85 Pac. 665.

15 Golden Gate etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184, 186, 23 Pac. 45.

16 Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238. Such a plea can not be made, Clamp v. Land, 122 Cal. 167-169, 54 Pac. 839; Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Bay City etc. Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225, and cases cited in these cases; First Nat'l Bk. v. California Nat'l Bk., 4 Cal. Unrep. 403, 35 Pac. 639; Francis v. Western Screen Co., 22 Cal. App. 32, 34, 133 Pac. 327; California Fruit Exch. v. Buck, 163 Cal. 223, 124 Pac. 824; First Nat'l Bank v. Pennig, 28 Cal. App. —, 151 Pac. 1153.

17 California etc. Ass'n v. Stelling, 141 Cal. 713-720, 75 Pac. 320.

18 Parrott v. Byers, 40 Cal. 615-624, 13 Morr. Min. Rep. 505.

A party who has made a contract with others as a corporation will not be allowed by way of collateral attack to deny that they were such corporation,[19] and where the plaintiff's opening testimony tended to prove that the company was at least a *de facto* corporation that evidence was held to dispense with further proof to establish that fact and that the plaintiff could not dispute the fact later in the trial.[20]

A *de facto* existence is sufficient, so far as the existence of a corporation is necessary, to sustain an indictment of one of its employees for embezzlement.[21] It has been argued by some that the Market Street Railway case[22] trenches upon this doctrine. So far as this doctrine was involved (though not discussed) in that case, it seems that the real question was one of *ultra vires* (though not mentioned) on the part of some of the companies consolidating. Corporations are artificial persons and labor under many disabilities and limitations as compared to natural persons, analogous to minors, incompetents, etc. Besides, the case presented was on an executory contract, against which the defense of *ultra vires* may always be raised. If some of the constituent corporations had no power to consent to or to enter the consolidation, it would be like Articles of Incorporation executed by insane persons, which would unquestionably be void and incapable of ratification by such disabled persons. And whether the Articles were duly executed may always be raised.[23] Again, the question submitted was the liability on a contract where the obligation, by its express terms, was depen-

19 California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 720, 75 Pac. 320, and cases cited.

20 Rondell v. Fay, 32 Cal. 354-361.

21 People v. Leonard, 106 Cal. 302, 39 Pac. 617.

22 Market St. Ry. v. Hellman, 109 Cal. 571, 42 Pac. 225.

23 Wall v. Mines, 130 Cal. 27, 39, 62 Pac. 386.

dent on the power of all the respective companies to consolidate and the validity of such consolidation; otherwise there was to be no obligation. It seems to us the dissenting opinion misses the real scope of the matters involved and decided.

In an early case[24] it was said: "This provision does not go to the extent of precluding a private person from denying the existence *de jure* or *de facto* [meaning both]. . . . It must be a corporation either *de jure* or *de facto,* or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action by a corporation that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation. . . . To say that the 'due incorporation' can not be inquired into does not mean that no inquiry can be made as to whether it is a corporation," but that irregularity in performance or omission of many things would not affect even the *de jure* existence of the corporation. The court, continuing, said a body of men can not meet and declare that they constitute a corporation, notwithstanding they do not adopt Articles of Incorporation, nor subscribe for capital stock, nor elect officers, nor perform any other act of organization, nor transact any business except that in question in the suit. This clearly draws the distinction between the cases where the question can and can not be raised. The language above quoted was quoted with approval in a later case.[25] This case attempts to define a *de facto* corporation. It says: "What is a corporation *de facto?*

24 Oroville etc. Co. v. Plumas Co., 37 Cal. 354, 360.

25 Martin v. Deetz, 102 Cal. 55, 64, 41 Am. St. Rep. 151, 36 Pac. 368, and both of above cases were cited as authority in People v. Reclamation Dist., 130 Cal. 607, 613, 63 Pac. 27, and Barnes v. Board of Supervisors, 13 Cal. App. 760, 766, 110 Pac. 820; Jaques v. Yuba Co., 24 Cal. App. 383, 141 Pac. 404, and Tulare etc. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. 531.

It exists when a number of persons have *organized and acted* as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body." This language has been quoted with approval in later cases.[26]

Quo warranto is the proper and only proceeding to test the right to a franchise to exist, or to procure a judgment of its forfeiture. It was held[27] that if it is claimed the proceedings were so defective that the persons acting never became a corporation, then the proceeding should be against the persons, and that it is error to join the alleged corporation, for doing so admits that it is a corporation. The meaning of various parts of the opinion, as applied to the facts and pleadings in the case, is ascertained with great difficulty. Without expressly so declaring, this case was later virtually overruled on the point that the corporation could not be joined in the proceeding.[28] In endeavoring to distinguish the cases it was said that in the present case it is alleged that the corporation is a *de facto* corporation (and it is proper to make it a defendant with those persons who constitute it), while in the Stanford case it was alleged it was not a corporation (but examination of the Stanford case shows the corporation was

26 Reclamation Dist. v. McPhee, 13 Cal. App. 382, 109 Pac. 1106, and Barnes v. Board of Supervisors, 13 Cal. App. 760, 766, 110 Pac. 820.

27 People v. Stanford, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. It was held in People v. Gunn, 85 Cal. 238, 244, 24 Pac. 718, that the doctrine of the Stanford case could not apply to a municipal corporation.

28 People v. Montecito etc. Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

at least *de facto* if not *de jure*). We may, therefore, conclude that the Stanford case is no longer of any importance in these matters.

MUST MAINTAIN OFFICE IN STATE—TRANSFER RECORDS, INSPECTION OF

Article 12, section 14, of the constitution is as follows:

> Every corporation (except religious, etc.) doing business in this state shall have and maintain an office or place in this state for the transaction of business, where transfers of stock shall be made, and in which shall be kept for inspection by every person having an interest therein, and legislative committees, books in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amounts owned by them respectively; the amount of stock paid in, and by whom; the transfers of stock; the amount of its assets and liabilities, and the names and places of residence of its officers.

The Civil Code, section 290, requires the place of this office (principal place of business) to be stated in the Articles. For method of transfer, see that subject.

This section of the constitution is broad enough to include foreign corporations doing business in this state, for it says "every corporation doing business in this state." The legislature and the courts have gone far in exercising power over such corporations, like the attempt to attach the cumulative method of voting at their elections and stockholders' liability for the debts of the corporation; the provision of the constitution to the effect that no foreign corporation shall be allowed to conduct business in this state under more favorable conditions than domestic corporations being considered by many lawyers (we think clearly erroneously) sufficient authority to cover most cases which

could arise. No attempt has yet been made, so far as has come to our knowledge, to compel a foreign corporation doing business in this state to keep the matters mentioned in this section at an office in this state. Certainly the form of expression of this section would make it self-executing.

The courts have given consideration to this section in only two cases thus far, although citing it in a number. It has been held that a stockholder has the right to inspect all books, etc., even if his design is to injure the business of the company; the law takes no account of his motives.[29]

[29] Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; Gavin v. Pacific Coast etc. Union, 2 Cal. App. 638, 84 Pac. 270.

CHAPTER IV

POWERS OF CORPORATIONS

The purposes of a corporation, which sometimes are in the nature of powers, have already been considered. The powers, more literally speaking, are set out in sections 354 and 355 of the Civil Code, which read as follows:

> **§ 354.** Every corporation, as such, has power:
>
> 1. Of succession, by its corporate name, for the period limited; and when no period is limited, perpetually;
>
> 2. To sue and be sued, in any court;
>
> 3. To make and use a common seal, and alter the same at pleasure;
>
> 4. To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part;
>
> 5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation;
>
> 6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock;
>
> 7. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments;
>
> 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.

§ 355. In addition to the powers enumerated in the preceding section, and to those expressly given in that title of this part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given.

That the above sections do not embrace all the powers which a corporation may have has been expressly declared by the courts, saying: "All corporations organized under the laws of the state are, by the general law, vested with certain powers by express grant. This has been so . . . as to corporations created prior to the codes, as to those since. They are invested with further powers by the particular act under which they are incorporated, or by the title of the code under which they are formed."[1]

The powers enumerated are those which every ordinary corporation has, without enumerating them in its Articles, and none of them should be stated in the Articles.[2] All contracts or obligations are limited by the eighth subdivision to those essential to the transaction of its ordinary affairs, or to carry out the purposes of the corporation. If the purpose is stated in the Articles, the power is given to carry it out, otherwise not;[3] a corporation can not do business without limitation like a private individual. But it has been held that a mining corporation, authorized to use water for mining and other purposes, may change its use from mining to irrigation and domestic purposes.[4] Therefore the discussion of the powers of a corporation

1 Spring Valley etc. Works v. Schottler, 62 Cal. 69, 104.

2 In a very early case it was said "the power of corporations to create debts is treated as an incident of the express powers, and is not itself one of the express powers," Smith v. Eureka Flour M. Co., 6 Cal. 1-7.

3 McKiernan v. Lenzen, 56 Cal. 61-63.

4 Happy Valley etc. Co. v. Nelson, 169 Cal. 694, 147 Pac. 966.

becomes linked to its purposes. It has no powers but those inseparably connected with its purposes, except those enumerated in this section which pertain mostly to the method of operations and maintaining its existence.

In a very early case, which has not since been questioned, it was said a corporation "has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created, and none other. . . . In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, like natural persons, they are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men. . . . The general principle is that a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted."[5]

Nevertheless, the nature of some things is such as to make it impossible, or against public policy, for a corporation to engage in them. For example it can not hold land in joint tenancy with another,[6] nor should it become a partner in a business, but it has been said that if the corporation has the sole management of the business, it is not objectionable that the profits are divided with another.[7]

5 Union Water Co. v. Murphy etc. Co., 22 Cal. 621-629, 3 Morr. Min. Rep. 487.

6 Dewitt v. San Francisco, 2 Cal. 289.

7 Bates v. Coronado Beach Co., 109 Cal. 160, 162, 41 Pac. 855. The power of a corporation to enter into a partnership was raised in this case but not decided. Same in Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 518, 75 Pac. 106. Another instance of such a partnership occurs, but objection was raised neither by counsel or the court. Westcott v. Gilman, 170 Cal. ——, 150 Pac. 777.

In an early case[8] it was stated "that a corporation has no other powers than such as are specially granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted" (quoted from Angell & Ames on Corporations, sec. 111, as a statement of the common-law rule), and that, in order to preclude all doubt on this point, this language was copied in the second section of the corporation law of 1863-1864. It is significant that this narrow and rigid expression is not copied in our present statutes, although in a broad way it expresses the law as it exists today.

A rather broad statement of the meaning of the word "essential" is made where the court said:[9] "Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation, or those to whom the management of its affairs is entrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representatives, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect." And in a case where a mortgagor resisted a foreclosure on the ground that the plaintiff, a corporation, had no power to invest its funds in and hold the mortgage, the court said: "Whether the purchase of the mortgage in question was such as the purposes of the corporation required was to be determined by its board of directors, and is not open to investigation at the instance of the defendant."[10]

Under the act of 1861, which, in respect to these matters, was substantially the same as the Civil Code sec-

8 Vandall v. South San Francisco Dock Co., 40 Cal. 83, 88.

9 Bates v. Coronado Beach Co., 109 Cal. 160, 163, 41 Pac. 855.

10 Savings Bank v. Barrett, 126 Cal. 413, 417, 58 Pac. 914.

tions above, it was held that a railroad corporation, which has powers to lease lines, may guarantee the payment of the bonds of the leased line, although not expressly authorized by the law or its charter to guarantee the payment of the obligations of others. This conclusion was reached on the ground that the corporation had all the rights of natural persons in carrying on its lawful business, and, as an incident of its power to lease other railroads, it could issue bonds in payment for the lease, and, the guaranty being a part of the purchase price of the lease, it was proper and lawful to guarantee the payment of the bonds under such circumstances.[11] And a real estate company with powers to improve the same could, under such powers, give aid to a railroad proposed to be constructed to a point near its land.[12] Also, promissory notes issued as a gratuity by a street railroad to a baseball park were held valid.[13] These cases were based on the doctrine that, while not expressly enumerated among the powers of the particular corporations, these powers were properly included in those necessary to the exercise of enumerated powers. They certainly go to the full extent in liberality of construction. It is also held that a corporation may act as agent in a business or transaction, if that is one of its enumerated purposes,[14] otherwise not; also as trustee.[15]

At the common law the power to own land is tacitly, and without any express provision, considered insep-

11 Low v. Central Pacific R. R., 52 Cal. 53, 58, 28 Am. Rep. 629.

12 Vandall v. South San Francisco Dock Co., 40 Cal. 83, 88.

13 Temple St. etc. Ry. v. Hellman, 103 Cal. 634-640, 37 Pac. 530.

14 Christie v. Sherwood, 113 Cal. 526, 531, 45 Pac. 820.

15 Baldwin v. Miller & Lux, 152 Cal. 454, 92 Pac. 1030. It does not appear in this case whether the corporation was organized under the special statutes concerning corporations acting as trustees; if not it could not have such powers.

arable from every corporation;[16] but in this connection we should not lose sight of the constitutional restriction[17] on a corporation holding real estate longer than five years, except such as may be necessary for carrying on its business, and section 360 of the Civil Code, prohibiting more than reasonably necessary for the transaction of its business or the construction of its works, except as otherwise provided. But if a corporation in this state is organized for the specific purpose of purchasing, holding, and selling land, its power in that respect is not limited.[18]

In an early case,[19] which has been frequently approved, it was said that "it is well settled that the contracts of corporations stand upon the same footing as those of natural persons, and depend upon the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter. There is no difference in this respect between public and private corporations. . . . Where the question is one of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the contract can not be permitted, in an action founded on it, to question its validity. . . . Of course an executory contract made without authority can not be enforced; but a different question arises where the contract has

16 People v. La Rue, 67 Cal. 526, 531, 8 Pac. 84; Stockton etc. Bank v. Staples, 98 Cal. 189, 192, 32 Pac. 936; Granite etc. Co. v. Maginness, 118 Cal. 131, 138, 50 Pac. 269.

17 Art. 12, section 9.

18 So said in Market Ry. Co. v. Hellman, 109 Cal. 571, 590, 42 Pac. 225; this was probably dictum, but that this is the law is not questioned.

19 Argenti v. San Francisco, 16 Cal. 255, 265, 266, 273.

been executed and the corporation has received the benefit of it. In such a case the law interposes an estoppel, and will not permit the validity of the contract to be called in question." This case was quoted fully with approval in a quite recent case.[20]

Having power to enter into an obligation or contract essential to its business, a corporation may assign its *choses* in action in payment of its obligations, and in the absence of fraud such assignment is good as against other creditors of the corporation,[21] and where the management of the affairs of the corporation is entrusted to its general manager and superintendent it is bound by his acts.[22]

A corporation has power to create indebtedness in excess of its subscribed capital stock; the prohibition contained in section 309 of the Civil Code is upon the directors and merely gives the corporation a remedy against them if they create debts in excess of this amount.[23] A corporation has power to appoint a sole agent to sell its product, and if the corporation reserves the right to approve or disapprove the acts of the agent, such an arrangement is not a turning over of the management of the business to persons other than the directors.[24]

20 Contra Costa W. Co. v. Breed, 139 Cal. 432-436, 73 Pac. 189. Cited in Hudepohl v. Liberty Hill etc. M. Co., 80 Cal. 553, 559, 22 Pac. 339; principle approved in Sacramento Co. v. Southern Pacific Co., 127 Cal. 217, 59 Pac. 568, 825; Beatty, C. J., dissenting as to municipal corporations; as to which see also Zottman v. San Francisco, 20 Cal. 97-109, 81 Am. Dec. 96. For a vigorous statement of these principles, see McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927.

21 McKiernan v. Lenzen, 56 Cal. 61, 63.

22 Ibid and McCormick v. Stockton etc. Co., 130 Cal. 100, 62 Pac. 267.

23 Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 309, 28 Pac. 1049.

24 San Diego etc. Co. v. San Diego etc. Co., 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

A corporation has power to purchase and operate franchises originally granted to individuals (if the latter have the power to sell them) if the operation of the franchises comes within one or more of the purposes of the corporation.[25] Where a franchise was granted to individuals, and requiring them to incorporate, the franchise passed to the corporation when it was incorporated.[26]

Some of the foregoing instances are given as examples of the application of the comparatively modern interpretation of the rule that corporations "are bound to follow strictly the letter of their charter, and can exercise no power unless granted to them," or "absolutely necessary to carry out the power so granted";[27] or "can possess or exercise such corporate powers only as are expressly given by statute, or by their charters, and such as shall be necessary to the exercise of the powers enumerated and given";[28] or "those essential to the declared objects and purposes of the corporation." Clouds of cases of liberal construction of the powers of corporations could be cited. They illustrate the futility of definition; the more brief or brilliant the definition, the more erroneous it is likely to be.

The foregoing citations do not cover an appreciable part of the cases where the powers of corporations were involved and determined; the cases will be found under nearly all the headings of a work of this character.

25 San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075. See California etc. Co. v. Alta Tel. Co., 22 Cal. 398. The state only can raise the question.

26 Spring Valley etc. Works v. San Francisco, 22 Cal. 434; People v. Stanford, 27 Cal. 321.

27 Smith v. Morse, 2 Cal. 524, 539 (1852).

28 Dunbar v. San Francisco, 1 Cal. 356 (1850).

SUCCESSION

The word "succession" in the first clause of this section means the perpetual succession of individuals, the members succeeding each other, so that the body continues the same notwithstanding the change of individuals who compose it, thus giving it perpetual life. It does not mean "succeeding" to the business, property, or franchises of another corporation or of individuals; such rights are "acquired" either by gift, purchase, consolidation with another corporation, or sometimes by reorganization. A corporation has no "successor," like trustees, executors, and the like, and the use of the term in that sense, although not infrequent in deeds and contracts, is erroneous.

RIGHT TO SUE AND BE SUED

This power or right is also conferred by the constitution, article 12, section 4, and at common law is an incident of every corporation,[29] and the stockholder can not interfere with this right, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of a cause of action, and even then his suit must be expressly in behalf of the corporation. Such a suit may be instituted in the names of the stockholders, but in it they can set up such grounds and obtain such relief only as the corporation could do or receive if it instituted the suit.[30]

CORPORATE SEAL

A seal which is habitually used as the seal of a corporation, although not regularly adopted as such by a

29 Curtiss v. Murry, 26 Cal. 633, 634; Baines v. Babcock, 95 Cal. 581, 592, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

30 Waymire v. San Francisco etc. Co., 112 Cal. 646, 44 Pac. 1086; Cogswell v. Bull, 39 Cal. 320. See Stockholders' Rights and Duties, post.

resolution of the board of directors, becomes the common seal of the corporation, and when attached to an instrument, when proved to be the seal so used by the corporation, with proof of the names and signatures of the officers, is *prima facie* evidence of the due execution of the instrument.[81] If no seal is attached, it is necessary to prove that the instrument was executed by authority of a resolution of the board of directors, or ratified by such a resolution duly entered upon the minutes of the board.[82]

But this rule does not seem to have been followed in all cases decided during the period covered by the decisions cited, for we find the court saying: "If upon the face of the instrument there are indications suggestive of agency, such as *words of office,* or agency, to the signature, or the imprint of the corporate title on the paper, parol evidence is competent to show whom the parties intended should be bound or *benefited.* And even where the contract *bears no such suggestion* on its face, the rule as now generally received is that parol

[81] Blood v. La Serena etc. Co., 113 Cal. 221, 225, 41 Pac. 1017, 45 Pac. 272; Potts Drug Co. v. Benedict, 156 Cal. 322-329, 25 L. R. A. (N. S.) 609, 104 Pac. 432; Southern California etc. Assn. v. Bustamente, 52 Cal. 192; Schallard v. Eel River etc. Co., 70 Cal. 144, 146, 11 Pac. 590; Crescent City Wharf etc. Co. v. Simpson, 77 Cal. 286, 290, 19 Pac. 426; Mills v. Boyle etc. Co., 132 Cal. 95, 64 Pac. 122; McKee v. Cunningham, 2 Cal. App. 684, 687, 84 Pac. 260; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Bliss v. Kaweah etc. Co., 65 Cal. 502, 4 Pac. 507; Andres v. Fry, 113 Cal. 124, 45 Pac. 534; Watkins v. Glas, 5 Cal. App. 68-77, 89 Pac. 840; Vaca Valley etc. Co. v. Mansfield, 84 Cal. 560, 566, 24 Pac. 145; Chandler v. Hart, 161 Cal. 405, 420, Ann. Cas. 1913B, 1094, 119 Pac. 516.

[82] Barney v. Pforr, 117 Cal. 56, 48 Pac. 987; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Fudickar v. East Riverside etc. Co., 109 Cal. 29, 39, 41 Pac. 1024; Crowley v. Genesee Min. Co., 55 Cal. 273, 4 Morr. Min. Rep. 71; McKiernan v. Lenzen, 56 Cal. 61.

evidence is competent either *in favor* of or against the corporation.'"[33]

In a recent case decided by the district court of appeal, the rigidity of this rule was reasonably relaxed, the court holding that where an assignment of a note by a corporation bore no seal, but it was shown that it was the custom of the corporation to sell notes received by it to banks, and that the note was indorsed by the secretary and vice president, who was also the general manager of the corporation, and that they had full control of the business of the corporation, the necessary authority will be inferred, notwithstanding there was no formal resolution authorizing the transaction.[34] This conclusion was largely founded on possession of the note and the presumption of right action in dealing with negotiable securities extending also to corporations.

A corporation may adopt a private seal as its own seal, and it may alter the seal at pleasure.[35] The seal itself is *prima facie* evidence that it was affixed by proper authority, and the secretary of the corporation being usually the proper officer to affix the seal, it devolves upon the party denying the execution of the instrument to prove that the secretary had no authority

33 Southern Pac. etc. Co. v. Von Schmidt etc. Co., 118 Cal. 368, 372, 50 Pac. 650; quoted with approval in Escondido Oil etc. Co. v. Glaser, 144 Cal. 494, 499, 77 Pac. 1040; Pacific etc. Co. v. Jones, 164 Cal. 260, 263, 128 Pac. 404.

34 Ramboz v. Stansbury, 13 Cal. App. 649, 110 Pac. 472. In a still later case it was said that "it is no longer held to be necessary that the ordinary, every-day transactions of a corporation be evidenced by a writing attested with the corporate seal." Smith v. Jaccard, 20 Cal. App. 280, 286, 128 Pac. 1023, 1026.

35 Richardson v. Scott etc. Co., 22 Cal. 150; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607, 3 Morr. Min. Rep. 516.

to affix it.[36] It was said that while the seal itself is *prima facie* evidence that it was affixed by proper authority, yet the fact that the seal is attached to an instrument does not render it a corporate act unless it is affixed by an officer or agent duly authorized; but the court added that the presumption that a bank cashier, and probably similar officials of other corporations, had authority to affix the seal will not be overcome by the fact that there was no vote of the directors on that subject.[37] It is usual to give this authority in the by-laws. It is not necessary to state in a deed that the seal is the seal of the corporation; this fact may be presumed sometimes from the language of the conveyance, or it may be proved by evidence *aliunde*.[38] A seal proves, if the instrument is otherwise in form, that the instrument is the act of the corporation; if no seal is attached, the authority to execute it must be proved, as we have seen. A certified copy of a resolution of the directors with the seal attached, delivered to a party dealing with the corporation is good evidence without production of the minutes of the board, and under some circumstances the truth of its contents can not be disputed by the corporation.[39] A corporation sole has no need of a seal, nor of a secretary or treasurer or by-laws.[40]

If a contract is properly authorized by the directors, or if the authority of the officer or agent may be inferred from his relations to the corporation, or from

[36] Underhill v. Santa Barbara, 93 Cal. 300, 28 Pac. 1049; and cases cited and Richardson v. Scott etc. Co., 22 Cal. 150.

[37] Bliss v. Kaweah etc. Co., 65 Cal. 503, 4 Pac. 507.

[38] Richardson v. Scott River etc. Co., 22 Cal. 150.

[39] Hawley v. Gray Bros., 106 Cal. 337, 39 Pac. 609; Purser v. Eagle Lake etc. Co., 111 Cal. 139, 43 Pac. 523.

[40] Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 Pac. 830.

its usual manner of conducting its business, no seal of the corporation is necessary to make it valid.[41]

If the seal attached purports to be the corporate seal, in the absence of objection, it must be assumed to be genuine and to have been affixed by proper authority, and is evidence of the corporate act which it purports to authenticate, and the burden of proving the contrary is on the party denying it.[42] It is held in other states and by the supreme court of the United States that a scroll is sufficient, and that the seal need not be in any particular form, nor need it be upon wax, but it may be impressed upon the paper.

HOLDING AND SELLING REAL ESTATE

The latter clause of article 12, section 9, of the constitution reads as follows:

> Nor shall it (a corporation) hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business.

While this provision limiting the right to hold real estate is mandatory and prohibitory, it does not provide as a penalty that the land shall escheat to the state, nor declare what results shall follow its violation. The constitution prescribing no penalty, the legislature has power to do so, and in case of savings and loan societies, it has required that such land must be sold within five years (section 574, Civil Code) after title has vested, and the court says that it feels satisfied that

41 Crowley v. Genesee etc. Co., 55 Cal. 273, 4 Morr. Min. Rep. 71; and even if not authorized by the directors, it is good if made in the usual course of business, Scott v. Superior Sunset Oil Co., 144 Cal. 140, 142, 77 Pac. 817. See President and Officers, post.

42 Burnett v. Lyford, 93 Cal. 114, 117, 28 Pac. 855; Reid v. Clay, 134 Cal. 207, 213, 66 Pac. 262; Mills v. Boyle Mining Co., 132 Cal. 95, 64 Pac. 122; Andres v. Fry, 113 Cal. 124, 45 Pac. 534; Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904.

such is the purpose of the constitution, and that if the corporation does not sell the land within five years after it acquired it, "penalties may be prescribed by the legislature, or, possibly, some judicial procedure might be invoked, compelling a sale of the land or a forfeiture of its franchise."[43] This is the only case construing this provision of the constitution, and the legislature had provided no penalty before this decision, nor has it since. No individual can raise the question and the state has not seemed inclined to do so, and, in the absence of a statute, whether it could maintain the proceedings suggested is not free from uncertainty.

That an individual can not raise this question where he was a stranger to the act complained of has been decided.[44]

Section 360 of the Civil Code reads as follows:

> § 360. No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except as otherwise specially provided.
>
> A corporation may acquire real property, as provided in title seven, part three, of the Code of Civil Procedure, when needed for any of the uses and purposes mentioned in said title.
>
> By a unanimous vote of all the directors at any regular meeting, any corporation existing, or hereafter to be formed under the laws of this state, may acquire and hold the land and building on and in which its business is carried on, and may improve the same to any extent required for the convenient transaction of its business.

[43] People v. Stockton Savings etc. Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078.

[44] Youd v. German Savings etc. Soc., 3 Cal. App. 706, 710, 86 Pac. 991.

BUSINESS CORPORATIONS CAN NOT TAKE PROPERTY UNDER A WILL

Section 1275 of the Civil Code is as follows:

> § 1275. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, can not take under a will, unless expressly authorized by statute; subject, however, to the provisions of section 1313. (Amended March 21, 1905, Stats. 1905, p. 605.)

Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized abridging this power, it must be shown affirmatively.[45] It may acquire title to land by prescription and is not limited to purchase or to condemnation under certain sections of the code.[46] Whether the real estate is necessary for the corporation is a matter between the government and the corporation only.[47] But if the corporation has no power to own a certain kind of land (as land not necessary for the construction or operation of a turnpike company), it can not hold it in the name of other persons for its benefit or the benefit of its stockholders,[48] nor can it hold land as a joint tenant, but it may do so as tenant in common.[49] It has been held that a brewing

45 Granite Gold M. Co. v. Maginness, 118 Cal. 131, 138, 50 Pac. 269, and cases cited, and Diamond etc. Co. v. Cook, 6 Cal. Unrep. 446, 61 Pac. 578.

46 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 594, 77 Pac. 1113.

47 Natoma etc. Co. v. Clarkin, 14 Cal. 552, 553, and see also Union etc. Co. v. Murphy's Flat etc. Co., 22 Cal. 620, 631, 3 Morr. Min. Rep. 487.

48 Coleman v. San Rafael etc. Co., 49 Cal. 517, 521.

49 De Witt v. San Francisco, 2 Cal. 289-97.

corporation is not prevented by section 360 above from owning or leasing many places in which to sell its product, any more than it is to own the land and building where it carries on its manufacture.[50] Where one of the purposes for which a corporation is organized is dealing in land, its power to hold land is unlimited.[51] Where a corporation is not *in esse* at the time of the attempted delivery of a deed, no legal delivery is made, and the acceptance of a deed will not be presumed from its beneficial character when the grantee named purports to be a corporation which at the time has no legal existence.[52] But what is said in this case should be taken in connection with the fact that the court held the pretended corporation never at any time prior to the suit had even a *de facto* existence. In a later case[53] it was held, though a deed was executed prior to the organization of the corporation, if, after the organization, it was delivered to the corporation, that the deed was valid and was effectual to convey the property to the corporation. And a corporation has the full power of disposing of real estate to the same extent as natural persons, except as they may be expressly restrained as to subject or manner by the statutes.[54] It is not essential that a deed state upon its face that the grantor is a corporation,[55] but it is not a commendable practice to omit such a statement for many obvious reasons. The action of two-thirds of the stockholders consenting to the transfer of all of its property, business, and fran-

50 McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927.

51 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

52 Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

53 San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

54 People v. Trustees of California College, 38 Cal. 166.

55 Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

chises is binding upon all the other stockholders.[56] That a misnomer of a corporation will not invalidate a grant either to or by a corporation is a general rule, if it appears from the instrument itself or by other proper evidence that the corporation was intended.[57]

All corporations capable of taking and holding real property have the right of disposing of the same as fully as natural persons.[58] The consent of two-thirds of the stockholders of mining corporations to a conveyance of its mining ground, required by Stats. 1880, p. 131, was repealed by Stats. 1905, p. 74, so the decisions on that feature of this subject are no longer of general interest. Neither the president nor the secretary alone, nor both together, can convey or mortgage the real estate of a corporation. This can be done only by resolution of the board of directors;[59] the consent of two-thirds of the stockholders alone is not sufficient, and a resolution of a preliminary meeting of stockholders prior to the organization of the corporation is not sufficient to support a conveyance by the directors or officers;[60] the consent of two-thirds of the stockholders is necessary in creating a bonded indebtedness.[61] And to convey all of its property, business, and franchise two-thirds of the issued stock must con-

56 Graham v. Pasadena Land etc. Co., 152 Cal. 596, 93 Pac. 298; McTigue v. Arctic Ice etc. Co., 20 Cal. App. 708, 714, 130 Pac. 165.

57 Sixth District etc. Assn. v. Wright, 154 Cal. 119, 97 Pac. 144.

58 Miners' Ditch Co. v. Zellerbach, 37 Cal. 543-88, 99 Am. Dec. 300; People v. California College, 38 Cal. 166.

59 Alta Silver M. Co. v. Alta Placer Mining Co., 78 Cal. 629, 632, 21 Pac. 373; Curtin v. Salmon River etc., 141 Cal. 308, 310, 99 Am. St. Rep. 75, 74 Pac. 851.

60 Blood v. La Serena etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607, 3 Morr. Min. Rep. 516.

61 Civil Code, sec. 359.

sent,[62] but an assignment of a mortgage by the president, in the name of the corporation with the seal attached, is sufficient.[63] (See Civil Code, sec. 299, ante, and Constitution, art. 12, sec. 9, post.)

HOLDING STOCK IN OTHER CORPORATIONS

A corporation has no implied authority to invest in the shares of stock of another corporation. To do so would enable it to abandon the purposes for which it was organized and invest its funds in another kind of business. It would also make its stockholders liable for debts which neither they nor their directors created. Stockholders become such on the faith of the agreement in the Articles that the funds of the corporation will be used in carrying out a certain business.[64] But if its Articles include as one of the purposes of the corporation "buying, selling and dealing in all kinds of public and private stocks, bonds and securities," the corporation may invest its funds in such stocks and securities,[65] and although national banks have no power to purchase or subscribe for the stock of another corporation, they may become lawful owners of such stocks, where the ownership arises from proceedings to collect loans to which such stocks were pledged as security,[66] and there is no presumption, in the absence of

62 Civil Code, sec. 361a.

63 Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855.

64 Knowles v. Sandercok, 107 Cal. 629, 642, 40 Pac. 1047; and cases cited from other states.

65 Market Street Ry. Co. v. Hellman, 109 Cal. 571, 590, 42 Pac. 225.

66 Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; Chemical Nat. Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; McBoyle v. Union etc. Bank, 162 Cal. 277, 122 Pac. 458.

evidence, that the corporation has no such power.[67] But it is *ultra vires* for a corporation to purchase its own stock (except in the collection of an assessment), for by so doing it diminishes the amount of its capital stock,[68] which it can not do except by the method expressly provided in the Civil Code. The shares so purchased are not extinguished, but may be again sold or may be tendered back to the vendor upon a rescission of the contract; this rule, however, does not prevent the corporation from being held liable for conversion of shares by refusing to transfer them on its books to a purchaser of the same from a stockholder.[69] But this result, diminishing the capital, is accomplished by operation of law as a consequence of wrongs done to others and not by virtue of any lawful powers in conducting its usual business, and is forced upon the corporation by the election of the injured party to treat the action as a conversion of the shares by the corporation, instead of suing to compel the corporation to make the transfer of the shares to him upon the books. For prohibition of one corporation exchanging its stocks or bonds for the stocks and bonds of another, see Penal Code, section 560, post.

MAY PLEDGE OR MORTGAGE SUCH SHARES

If a corporation is authorized to own shares of stock in other corporations, it follows that it may deal with such shares in the same manner and to the same extent

67 Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; same principle as to holding real estate; Stockton etc. Bank v. Staples, 98 Cal. 189, 192, 32 Pac. 936.

68 Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444; cited in Ralston v. Bank of California, 112 Cal. 208, 214, 44 Pac. 476.

69 Ralston v. Bank of California, 112 Cal. 208, 214, 44 Pac. 476.

as natural persons, and, of course, it may pledge or mortgage them.

MAY THUS AFFECT FOREIGN REAL ESTATE

A California corporation, owning all of the stock of a foreign corporation and pledging or mortgaging all of the shares of stock so owned by it, may thus create an equitable mortgage upon the land owned by the foreign corporation in such foreign country, although, by the laws of that country, a mortgage to a California corporation would be void.[70] It was admitted that the court's decree could not operate on the property itself or adjudicate the title thereto. But the court had jurisdiction over the domestic corporation and over the shares of stock of the foreign corporation held by it. The exercise of the court's powers *in personam* over the domestic corporation, by an order that the shares be sold in payment of the pledge or mortgage, accomplishes the same result as if the pledge or mortgage was of the land itself. The fact that a court in the foreign country had appointed a receiver of the property of the foreign corporation, does not prevent this result, for the receiver holds no adverse title. An interesting discussion of the power of a court to order a sale of the entire property, where it consists of a single working enterprise, and dismemberment would destroy its value, though part of the same is located in a foreign country, is contained in the court's opinion in this case. For this reason the property of the domestic corporation located in California, and the stock held by it in the foreign corporation, were ordered sold as a whole, and for the same reason, that it be sold without right of redemption.

70 Title Ins. & T. Co. v. California Development Co., 171 Cal. —; 152 Pac. 542.

IMPLIED CONTRACTS

In a very early case,[71] in a concurring opinion Field J. said, "the obligation to do justice rests equally upon it (the corporation) as upon an individual. It can not avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations," which language has been often quoted with approval. Where the statute[72] provided that no contract of the corporation should be binding unless in writing, the court limited this provision to suits upon contracts which were wholly executory, and held the corporation liable, on an executed contract where it had received its benefits under it, to an implied promise to pay the reasonable value. And again[73] where the money "was obtained by and disbursed through the proper financial officer of the company . . . if applied to the proper uses of the company there at once arose an implied promise to repay it." A subject closely related to this one is Ratification, which see.

The remaining clauses of this section of the Civil Code (354) will be considered under their separate headings.

ULTRA VIRES OBLIGATIONS

The discussion of the various obligations which are *ultra vires* will be considered under their respective headings or kinds. At this point we will consider the cases which illustrate the doctrine only.

71 San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

72 Foulke v. San Diego S. P. R. R. Co., 51 Cal. 365; see, also, Brown v. Board of Education etc., 103 Cal. 531, 37 Pac. 503.

73 Pauly v. Pauly, 107 Cal. 8-19, 48 Am. St. Rep. 98, 40 Pac. 29.

Article 12, section 9 of the constitution is as follows:

> No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized; nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business.

The courts of this state, and particularly the supreme court of the United States, have given a wider scope to the doctrine of *ultra vires* than has met the approval of or been followed by the courts of the other states of the union.

In an early case[74] Sawyer J. says "an act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. . . . When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto,* and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case." This definition, or if we broaden the word and call it description, of what is *ultra vires* does not lighten the difficulty of determining what comes within its scope. It is like nearly all definitions—it states the value of one unknown quantity in the terms of another unknown quantity.

[74] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 578, 99 Am. Dec. 300.

After all, practically every case is decided upon its own particular facts, and the reasoning upon them; then the indeterminate measure of definition is laid down upon it, and it is declared that the case comes within its termini. But no one but the final arbiter can forecast the result, and indeed it does not become a fact until so declared. Hence it becomes necessary to consider each case upon its own facts and circumstances.

In the case cited it was further said, when the want of power appears on comparing the act with the provisions of the charter the party dealing with the corporation is presumed to have knowledge of the defect and the defense of *ultra vires* is available (to the corporation) against him.

The doctrine of *ultra vires* is the creation solely of the courts, and, being said to be founded on general principles, is beyond the power of the legislature; everything done by legislation is subject to the interpretation of this doctrine.

This rule enables corporations to do a widespread business dangerous to the general public which, notwithstanding the theory, has no practical facilities for investigating and interpreting the charters of corporations, in which "eminent counsel" are so often mistaken. It is another rule enabling the shrewd and crafty to over-reach the trusting and unsuspecting. It gives the benefit to the corporation of the protection of the disabilities of a minor, or of a person *non compos mentis,* while it is well known that corporations are guided by the best of legal skill much more able to understand and interpret the provisions of their charters than the untrained and unsuspicious public. It makes the ordinary citizen guarantee the corporation and its stockholders against the corporation exceeding its powers, instead of the corporation and its stock-

holders themselves assuming that responsibility, as they should. The doctrine had its birth in a like stage of the evolution of the law's understanding of justice as the doctrines of "fellow servant negligence," "assumption of risk," "imputed guilt," "crime of error, belief, unbelief," etc. The gross injustice of the doctrine is carried still further, for it is well established that the doing of numberless *ultra vires* acts does not affect the existence of the corporation; it may go on with such transactions *ad libitum;* a citizen can not make any objection, and it is notorious that the state, which is the only one permitted to object, never does so. A more just rule would be that if the stockholders objected they could hold their agents, the officers and directors, responsible, but that they and their agents should be responsible to the public, dealing in good faith with them. However much the doctrine of *ultra vires* may be "sanctified" by judicial decision, it is not sanctified in fact. The unshackled conscience of disinterested men rejects it. We must look elsewhere and deeper for the underlying forces which produce many such rules. But right and truth are endowed with such life that though beaten down they can not be destroyed. Case after case is being taken out of the rule until, by and by, except as to matters expressly forbidden by statute or public policy, and possibly excepting in the supreme court of the United States which holds with so unvarying tenacity even to error, it will disappear forever; for the common judgment of mankind, in the end, prevails over all tribunals.

It was further said in the Zellerbach case, however, that if the act itself was within the charter, but the purpose, unknown to the party dealing with it, was unlawful, the party dealing with the corporation may not be despoiled of his property. And the next case, ignoring the rule, declared that a corporation could not retain the money received by a transaction, a part of which

was *ultra vires* as to the corporation, and escape liability on the contract.[75]

In an action founded upon tort, that is, arising *ex delicto* from the acts of the corporation's servants in performing acts ordered by their superiors, the defense of *ultra vires* as to the nature of the business is not available.[76]

The term *ultra vires* has been used in a loose and indiscriminate manner, being often applied to failure to take necessary precedent steps required by law to make the business legal or valid.

Properly speaking such transactions may be invalid. They are not *ultra vires* unless beyond the power of the corporation to do, no matter how regular the procedure may be. This distinction was correctly made in a case involving the validity of a mortgage executed by the president, without power to execute it having been conferred upon him by the directors. The court says the transaction was not *ultra vires,* and further, "That which a principal may authorize an agent to perform he may ratify when performed by the latter without authority. And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter."[77] And so where the officers had no power to assign certain secu-

[75] Main v. Casserly, 67 Cal. 128, 7 Pac. 426.

[76] Chamberlain v. Southern California etc. Co., 167 Cal. 500, 503, 140 Pac. 25.

[77] Gribble v. Columbus Brewing Co., 100 Cal. 67, 71, 34 Pac. 527. To the same effect, Blood v. La Serena etc. Co., 134 Cal. 361, 366, 66 Pac. 317; Tilden v. Goldy Machine Co., 9 Cal. App. 9, 98 Pac. 39; Newhall v. Joseph Levy Bag Co., 19 Cal. App. 9, 124 Pac. 875.

rities as a pledge, the corporation could not retain the money received on the pledge and repudiate the pledge,[78] and where the corporation had no express power to engage in hotel-keeping it could not deny responsibility for that reason to a guest who sustained a loss,[79] and where stockholders of a bank received dividends produced in part by deposits transferred to it by another bank absorbed by the former, they are estopped to deny the power of their bank to make the consolidation or absorption when sued on their statutory liability for the debts of their bank.[80]

In a recent case[81] decided by the district court of appeal, per Cooper J., the court said that the doctrine of *ultra vires,* when invoked by a stockholder or by the state as to contracts which are still executory, or in violation of the corporation's charter, or outside the scope and purposes of its organization, is regarded in a very different light from a case where it is relied upon by the corporation to escape its just liabilities upon an executed contract, or one even partially fulfilled, and says, "it is the policy of the law and the endeavor of the courts to hold corporations as well as natural persons to their contracts and make them liable for the obligations they have incurred. Such defense . . . is looked upon with disfavor, and particularly of late years when corporations have multiplied until they control and operate all kinds of business, and in many cases to the exclusion of individuals. . . . As to

78 Lawrence v. Johnson, 131 Cal. 175, 177, 63 Pac. 176.

79 Magee v. Pacific Imp. Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772.

80 Mitchell v. Beckman, 64 Cal. 117-121, 28 Pac. 110. See, also, Kennedy v. California Sav. Bank, 101 Cal. 495-500, 40 Am. St. Rep. 69, 35 Pac. 1039.

81 McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927; California Trona Co. v. Wilkinson, 20 Cal. App. 694, 707, 130 Pac. 165.

contracts of corporations that are *malum in se* or *malum prohibitum* they will not be enforced; but as to contracts not thus objectionable justice and public policy require that the doctrine of *ultra vires* should be limited in its scope and application."

It was held by our supreme court that where a corporation (a national bank) had no power under the law to purchase and own shares of stock in another corporation, still it might have done so legally by enforcing payment of a pledge, and it went much further in declaring that a person dealing with the corporation would be justified in assuming that it had become the owner of the stock by a transaction within its power, and, under such circumstances, the corporation will not be permitted to defend against its liability as such stockholder (the second corporation having become insolvent) by showing it became a stockholder in violation of law.[82] This case was taken, on writ of error, to the supreme court of the United States[83] which reversed the case on general principles, and particularly on the ground that it was alleged that the stock was not acquired through a pledge or in proceedings to collect a debt, apparently throwing the burden of proof on the opposing party to show that it had been so acquired, for it was conceded that the bank might lawfully become the owner of the stock in this manner. That court says: "Whatever divergence of opinion may arise on this question from conflicting decisions in some of the states, in this court it is settled in favor of the right of the corporation to plead the want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act," and that "the prohibition

82 Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

83 California Nat'l Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. 831, approved in First Nat'l Bank v. Hawkins, 174 U. S. 364, 43 L. Ed. 1007, 19 Sup. Ct. 739.

is implied from the failure to grant the power." That court also says, which is *dictum,* that the courts will not permit a corporation to retain the benefits of such a transaction and at the same time repudiate its obligation. If that doctrine were faithfully carried out, there could be no serious criticism of the doctrine, but it is not always possible to restore the parties to their former positions. This identical state of facts came up in a later case in our supreme court,[84] and its decision, of course, followed that of the supreme court of the United States in the above case, the court saying, "the question as to the power of the appellant (a national bank, which is incorporated under the laws of the United States) to subscribe for, purchase or own shares in said savings bank is one that must be determined from the statutes of the United States, and as to the construction of those statutes in that regard we must look to the supreme court of the United States, just as that court looks to the decisions of this court for the construction given to our own statutes where no federal question is involved."

As has been said, there is a very marked distinction between *ultra vires* contracts which are still executory, and those which have been performed. Where such a contract has not yet been performed, neither party has any remedy, neither can compel performance or sue for damages for failure to perform.[85]

But if they have been performed, if they are not against public policy, they may be virtually rescinded (although the term is not used), if it is possible to restore the parties to their former condition. If that

84 Chemical Nat'l Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071.

85 San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

can not be done, as in case of services performed, the corporation must pay for them notwithstanding.[86]

As an instance of the inaccurate use of the term *ultra vires,* it was applied to the execution of promissory notes by the officers of a corporation for borrowed money when they were not authorized by the directors to borrow the money or execute the notes.[87] If the transaction was *ultra vires* in any sense, it was so as to the officers and not as to the corporation. It was held that though the transaction was void, the corporation should pay back the money, *so far as it was applied to the proper uses of the corporation,* although the transaction had never been ratified by a legal action of the directors.

Illustrating the distinction between an act in itself *ultra vires,* and one to facilitate carrying out an *ultra vires* (strangely one illegal and the other legal) act is where money was borrowed for the purpose of carrying out the illegal act. It was held, there being no fraud and the two transactions not being inseparably connected, that there was no question of *ultra vires* in borrowing the money, and the corporation could not refuse to pay the loan.[88] In the absence of proof, a contract by a corporation which does not clearly appear on its face to be beyond the scope of its authority, will be presumed to be valid; the corporation must make good the defense of *ultra vires* by plea and proof.[89]

Bonds issued by a foreign public service corporation for the purpose of buying the property and franchises of a public service corporation in this state are not

[86] Kelly v. Ning Yung Ass'n, 2 Cal. App. 460, 464, 84 Pac. 321.

[87] Pauly v. Pauly, 107 Cal. 8, 18, 48 Am. St. Rep. 98, 40 Pac. 29.

[88] Taylor v. North Star etc. Mining Co., 79 Cal. 286, 21 Pac. 753.

[89] Brown v. Board of Education, 103 Cal. 531, 534, 37 Pac. 503; Deane v. Gray Bros. etc. Co., 109 Cal. 433, 435, 42 Pac. 443; Morgan v. Board of Education, 136 Cal. 245, 247, 68 Pac. 703.

invalid by reason of the fact that the transaction between the two corporations was *ultra vires,* and against public policy; the bond purchasers being in no manner connected with that transaction, although knowing for what purposes the money was to be used.[90] The court further said that there was nothing criminal or against good morals in the effort of one such company to acquire the plant and franchises of another such company; at most it was an attempt at something beyond its charter powers and forbidden by public policy. Moral turpitude, we think, is an important element to consider in all such transactions. Where this is absent, and the act is not expressly prohibited by statute, equity and the common sense of justice of mankind should not be lost sight of, or ignored if seen.

It is doubtful whether a corporation can pledge its "treasury stock," so called, for its debts; in an early case such a transaction was held illegal. The court said to do so was "to issue the stock without purchase or payment. The capital stock of a corporation, previous to its being issued, can not in any proper sense be called the property of the corporation. . . . The corporation possesses only the *right,* the *power* to issue the stock, and a condition precedent to the exercise of the power is the purchase and payment for the stock."[91]

In an early case, it was said that the purchaser of land from a corporation which had no power to sell the same could recover from the corporation only so much of the money paid by him as had been appropriated by it to its own use, and that the officers only were liable for the remainder.[92] It was also said that the require-

90 Illinois Trust etc. Co. v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

91 Brewster v. Hartley, 37 Cal. 15, 30, 99 Am. Dec. 237, and doubted but not decided in Hanson v. Sherman, 25 Cal. App. 169, 176, 143 Pac. 73.

92 Herzo v. San Francisco, 33 Cal. 134.

ment in the law that two-thirds of the stockholders of a mining corporation must consent to a conveyance of its property is for the benefit of its stockholders only; that outsiders can not impeach the transaction for that reason.[93]

Where the statute under which a water company was chartered provided that for water furnished to a city for certain purposes the city should pay "reasonable rates to be fixed in the manner required by law," and no rates being so fixed the city made a contract with the company to furnish water for such purposes at a gross monthly rate, it was held this contract was *ultra vires*, and therefore void, and that the company could not recover anything for the water so furnished.[94] It will be observed that this was an instance of *ultra vires* proper, that is, want of power in the corporation and not of certain officers, also that it involved the principle of public policy although that was not mentioned in the opinion. A case, decided on similar principles, was where a life insurance company was declared by statute to have no power to declare a policy forfeited, except upon notice, and this provision of the statute was waived in the policy. The court held that the company had no power to declare a policy forfeited without notice, and to do so was an *ultra vires* act and void, and that the waiver contained in the policy could not give the power in the face of the prohibition of the statute.[95]

There is a disability in the matter of corporations making contracts which is more inflexible and potent than *ultra vires;* that is, public policy. Where a con-

[93] Galbraith v. Shasta etc. Co., 143 Cal. 94, 76 Pac. 901.

[94] San Diego Water Co. v. San Diego, 59 Cal. 517.

[95] Griffith v. New York Life Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; approved in Osborne v. Home Life Ins. Co., 123 Cal. 610, 56 Pac. 616, and Harrigan v. Home Life Ins. Co., 128 Cal. 531, 542, 58 Pac. 180, 61 Pac. 99.

tract is against public policy there is no estoppel, and no relief will be granted to either party, even to one who has performed his part of the contract. An instance was where a gas company, organized for and furnishing gas to a city, leases its property to an individual without the consent of the city, and suit was brought to recover moneys alleged to be due under the lease.[96]

Combinations and monopolies, methods of conducting business, contracts which abridge or infringe civil rights or the performance of public duties, may be prohibited by or be void as against public policy. In such cases the corporation is subject to the same rules as individuals. An attempt has been made to maintain that *ultra vires* acts or contracts are invalid, on the contention that they are against public policy; but that is carrying deductions too far, for violation of anything prohibited, or failure to comply with any requirement, is in a sense against public policy. Illegality, because the thing is *ultra vires,* is quite different and distinct from illegality because against public policy, and the consequences, and the rights and remedies of persons in such cases, are quite different.

BANKING PROHIBITED

"No corporation shall create or issue bills, or notes, or other evidences of debt, upon loans or otherwise, for circulation as money." (Civil Code, sec. 356.)

The constitutional provision is as follows:

> No corporation or association, or individual shall issue or put in circulation, as money, anything but the lawful money of the United States. (Article 12, sec. 5.)

[96] Visalia Gas etc. Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; cited in Gallagher v. Equitable Gas etc. Co., 141 Cal. 699, 706, 75 Pac. 329.

No case has arisen where it was decided that a corporation or person had done such a thing; in two cases the charge was made, but the court held that the securities issued were not of that character, being simply obligations given for borrowed money.

A similar prohibition was contained in the constitution of 1849, under which a case arose where a corporation had given notes or orders upon its treasurer for money borrowed. It was claimed, under the above language, that the evidences of debt issued by the corporation came within this provision and were void. The court said, "the clear object of the restriction is to prevent corporations, by any device, from carrying on the business of banking; or in other words, to prevent the formation of moneyed corporations. They are prohibited from issuing bills or notes 'upon loans' or [this "or" is not now in the statute] for circulation as money; that is, they shall not lend their credit. To issue their bills upon loans implies from the meaning of the language that they are the lenders; while to issue bills for money which they borrow places them in the opposite relation of borrowers; and no sound reason can be assigned why they should not be borrowers,"[97] and the notes or orders were held to be valid. This case was affirmed the following year in a case where the corporation borrowed a large sum of money and issued a single promissory note therefor.[98]

[97] Magee v. Mokelumne M. etc. Co., 5 Cal. 258.

[98] Smith v. Eureka Flour Mills Co., 6 Cal. 1, 7. No limitation is made as to the size or denominations of these obligations. Large denominations would circulate with so much slowness and difficulty as to be impracticable, but small denominations might pass from hand to hand readily. The size of a loan does not affect its validity. The lender, not the borrower, would be the one putting them in circulation. Such a case would not be covered either by the constitution or the statute, and the language of neither conveys any clear meaning. "Upon loans" is so vague an expression as to convey no definite idea. Where

The court said the exclusion of one purpose for which such obligations could be issued, the right to issue them for all other purposes, was implied.

> the corporation lends money to another person it receives notes or evidences of indebtedness; it does not issue them. Where it borrows money it issues them, which apparently comes within the meaning of the words in which the statute is expressed. If it should be said that it is prohibited from issuing its notes or orders pledging the securities received by it on loans made by it for their payment, a reply would be: That is not the method of banking; banks do not issue bills upon their loans. The intent that they shall circulate as money is difficult to prove and may not exist at all, although they do actually circulate by the action of the holder. The language of the court in the Magee case is confused, and the result declared by no means follows the reasons stated. How issuing such securities upon loans could be "lending its credit" it is impossible to see, or how in such a case they would be "lenders"; they would be borrowers. No case has arisen since the two cited. We must look to the national banking act for some prohibition, and it is doubtful if that would cover the case supposed above.

CHAPTER V

FICTITIOUS STOCK AND BONDS

Article 12, section 11 of the constitution is as follows:

> **No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void.**
>
> **The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law.[1]**

This provision first appeared in the constitution of 1879, there being nothing of that character in the constitution of 1849. If anything more was intended in the first paragraph of this section than to prohibit the disposition of corporate securities, without a valuable consideration, it is not expressed, either directly or indirectly. If par value, or actual value, were intended, it does not so state, nor does the context indicate that intention, or any intent whatever on those points.

The clear intent is to prevent stock dividends, or the giving away of stock for any reason whatever; and fictitious stock or indebtedness means such as gives no moral right to the person receiving it to participate in the profits and the distribution of the estate of the corporation as between them and the other holders, or to take a part or all of the assets of the estate on a

[1] The first clause of this section is repeated as the first clause of section 359 of the Civil Code, being added by an amendment in 1885.

spurious claim of indebtedness. That the public is not concerned or affected is shown by the decisions,[2] and such stock has no legal existence, and therefore is not subject to assessment for the debts of the corporation; the issue of fictitious stock would increase rather than diminish the resources to which creditors might resort.

No matter what might be their par value, neither of these securities can be sold above its actual value, or indeed above its market value. It is well known that no corporation bonds, except of corporations long established and earning and paying dividends for a considerable number of years, can be sold at par. The same condition is even more marked in the case of stocks. Indeed, the stocks of some may be worth no more than one per cent, while others may be worth upwards of three thousand per cent of their par value. If these securities must be sold or exchanged at par, in the case of valuable securities, these provisions are no protection whatever; if the securities are worth less than par, or are of unknown value, these clauses would prevent doing any business whatever. It is a matter of common knowledge that seldom are purchases of such securities made except in ignorance of the original price paid. See post, subject of "Liability of Stockholders."

2 Kellerman v. Maier, 116 Cal. 424, 48 Pac. 371; Cortelyou v. Imperial Land Co., 156 Cal. 373, 376, 104 Pac. 695. But if the stock was purchased for a valuable consideration, although far below par, the purchase being legal, the purchasers become stockholders and liable to assessments to pay the debts of the corporation, Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190; R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488. But the Herron case is distinguished in an issue of stock for patent rights, Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166.

In the first case[3] involving this section, it was said, that the first clause was self executing, but that the second was not. In a later case,[4] however, it was decided that the provision in the second clause, requiring sixty days' public notice to be given, is mandatory and self executing. In the case first cited above the court said a corporation "could not increase its stock to an unreasonable amount beyond the value of the property actually received," and reaches this conclusion by the statement that "this would appear to be indicated by joining the words 'property actually received' with the words 'money paid' and 'labor done.'" It is perfectly obvious that the deduction is unsupported; at least by the argument stated. If a corporation may increase its stock a reasonable amount beyond the value of the property received, what amount would be unreasonable? The constitution says nothing whatever about a reasonable or unreasonable amount, nor does it say anything whatever about the value of the property received, or the par value or actual value of the stock. This construction puts something into the constitution which was not there before.

Similar statutes in some other states provide that property may be taken at a "fair valuation" in exchange for stock, or that stock may not be sold for less than par, or use other equivalent expressions, none of which are found in our constitution or statutes; therefore the decisions in such states are not in point. It will be observed in the decisions following that our courts of last resort, interpreting this clause of the constitution and code, have said, as between the corporation and the stockholders, and as between the stockholders themselves, that stocks may be sold by the

[3] Ewing v. Oroville, 56 Cal. 649, 653.

[4] Navajo etc. Co. v. Curry, 147 Cal. 581, 109 Am. St. Rep. 176, 82 Pac. 247. See, post, under title "Increasing or Diminishing Capital Stock."

corporation at any price below par, and that the subscriber or purchaser can not be compelled to pay them up to par, which conclusion is solidly founded in reason. But they have also decided that this rule has no application to creditors of the corporation, who, they say, may compel the stockholders to pay up the difference between the amount paid by them, or the fair value of the property given by them for stock, and the par value of the stock. It is perfectly obvious to the humblest mind that there does not exist in this clause of the constitution, or of the code, a warrant or support for this distinction, even infinitely small or attenuated; it is taken directly "out of the blue"; simply an exercise of the will and is not interpretation.

The next case involving the first clause of this section was to enjoin a water company from selling a proposed increase of stock at 87½ per cent of the par value thereof, which was the market price at that time of the existing shares. The court said it could not be held that the issue was fictitious, and said that no price could be fixed for the sale of stock which would be fictitious, that the constitution has given no definition of the word "fictitious," and that "in ascertaining the purport of the word, or rather its application, we must take into consideration the surrounding circumstances." The court says that no one can place his finger on a share of this stock which is feigned, imaginary, not real, counterfeit, false, or not genuine—all are of equal value; that sharing in the responsibility for the debts of the company, or removing the burden of debt on the old shares, may bring the value of the old shares up to par, which may be well worth the discount at which the new are proposed to be sold; that the word is used in contrast to the preceding words, that is to say, if stock is issued for money paid, labor done, or property actually received (price not named)

it is not fictitious.[5] But the rule is different as to creditors, (short payments being made in money); such stock is not paid up as to creditors.[6]

A promissory note given in payment for a subscription to the stock of a banking corporation is not void, nor is the stock issued therefor "fictitious," and this notwithstanding section 560 of the Penal Code makes it a misdemeanor for a director to accept a note in payment of any installment of stock. A promissory note is property and therefore is not forbidden to be received in payment for stock under the first clause of this section. But a secret agreement that such a note shall be payable only out of dividends is a fraud upon the other stockholders, and is void.[7]

But in a later case,[8] where the note given was payable on a condition which was not performed, without reference to the above case or stating any supporting reasons therefor, the court said that "if that section [of

[5] Stein v. Howard, 65 Cal. 616, 4 Pac. 662; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-67, 97 Pac. 1; McKee v. Title Ins. Co., 159 Cal. 206, 218, 113 Pac. 140.

[6] Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Union Sav. Bk. v. Leiter, 145 Cal. 696, 702, 79 Pac. 441; same as to a by-law, and O'Dea v. Hollywood and other cases, supra.

[7] The Dorsey case was followed by a very recent decision of the district court of appeal, Quartz Glass etc. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648; Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49. It was further said of a clause in the banking act of 1876 (repealed in 1893) that in the publication of semi-annual statements nothing should be deemed capital actually paid up except money, and that notes, checks, or other obligations of a stockholder should not be treated as paid in capital, yet that fact did not make the note invalid; but the bank was prohibited from advertising such stock as paid up. It was also held in this case that neither did section 560 of the Penal Code make such a promissory note void. See People v. Stockton etc. R. R. Co., 45 Cal. 306, 13 Am. Rep. 178.

[8] Jefferson v. Hewitt, 103 Cal. 624, 630, 37 Pac. 638.

the constitution and Civil Code, sec. 359, post] has any bearing on the case, it seems to us it must be construed to render void the certificate [of stock], and not the condition as to payment, and hence that the note was without any consideration." As a result of these cases the answer to that question is still uncertain, but the latter case is not well sustained by general principles.

Notes and mortgages executed by a corporation for money and property, although but a part of the consideration is received by the corporation at the dates of the notes, if it afterwards receives the full consideration, are not a fictitious indebtedness, and the fact that they exceed the subscribed capital stock does not make them void, either under the constitution or section 309 of the Civil Code. The remedy, if any, is against the directors,[9] and such non-negotiable notes, although secured by mortgage, are not a "bonded indebtedness." A pledge of its bonds may be made by a corporation where money or other property is received by it in consequence.[10]

A corporation was organized to purchase the property of two other corporations (street car lines). The five directors of the new corporation held all of its stock then issued (a small amount), and held a great part of the stock of the two others to be purchased. The trade was accomplished by these five directors issuing to themselves and others all of the stock of the new corporation, and a lot of its bonds, for the stock of the old corporations, and it appears the old companies conveyed their street franchises and property to the new corporation. No rights of creditors were involved.

9 Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049. The notes in this case appear to have been given for future advances, as required.

10 Illinois Trust etc. v. Pacific Railway Co., 117 Cal. 332, 344, 49 Pac. 197.

It was held that by the unanimous concurrence of all the directors and stockholders, its shares may be issued as paid up for less than par in money or property,[11] and by listing the stock on a public stock exchange, where the holder purchased it, estops the corporation from claiming its invalidity.

In another case,[12] where no rights of creditors were involved, a part of the stock was issued as fully paid, for property which the trial court found was worth only fifty cents for each share issued therefor. Afterward treasury shares were sold at fifty cents a share for cash, and issued as fully paid. Later an assessment of ten cents a share was levied on all shares alike. The plaintiff, who held shares issued for the property, attacked the validity of the assessment, claiming that his shares were fully paid, and that those sold for cash were not, and that the assessment should be levied upon the latter only. It was held that, as between stockholders, stock may be issued as fully paid for less than par, and that all the shares in this company stood on the same plane as to each other, and were fully paid, and that the assessment should be equal on all. Without so stating, apparently the finding of the lower court that the property was worth only fifty cents a share for the shares issued for it was not important or probably material.

But it has been since decided that such stock is not paid up, so far as creditors are concerned; the creditor

11 Smith v. Martin, 135 Cal. 247, 67 Pac. 779; affirming Smith v. Ferries etc. Co., 5 Cal. Unrep. 889, 51 Pac. 710. In a later case, no right of creditors being involved, the court seemed to take for granted that such a bonus in bonds was not improper. Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871, and so as to a bonus of land with the stock. Rideout v. National etc. Assn., 14 Cal. App. 349, 112 Pac. 192.

12 Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100. See also Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

may recover the difference in a suit against the stockholder.[13] This right is independent of the constitutional and statutory liability of the stockholder for his proportion of all the debts of the corporation.

Where stock was sold at fifty cents a share and afterwards the price was reduced to twenty-five cents a share and thereupon sufficient shares were issued to the first purchasers, without the payment of anything, to reduce the price of their purchase to twenty-five cents a share, it was held that the shares so issued without the payment of anything therefor were void, and as a consequence they were not subject to assessment to pay the debts of the company.[14] It was also said in this case that the persons organizing a corporation, being all the stockholders or subscribers at that time, could legally issue to themselves the stock of the company in payment for property conveyed by them to the company as full paid stock and that no public policy would be violated by so doing and no one was injured thereby. This may have been a *dictum* in that case, but it has been since confirmed.[15]

In the Garretson case cited above, it was also said that it makes no difference if such shares are not issued to the original stockholder until after other shares have been sold to persons becoming stockholders later. The latter stockholders can not sue the original stockhold-

13 R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488; Merchants' etc. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091. As to issuing stock for patent rights, see Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166.

14 Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; but if paid up in cash at less than par the case is different. Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 585, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

15 Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 188, 79 Pac. 838; Smith v. Ferries etc. Co., 5 Cal. Unrep. 889, 51 Pac. 710, and cases cited in each. Greve v. Echo Oil Co., 8 Cal. App. 275-283, 96 Pac. 904.

ers in behalf of the company to compel them to pay anything further on their stock; if they have been misled to their injury by statements as to what the others paid for their stock their remedy, if any, is a personal action against the persons making the misstatements.

But if stock is issued to a person, without consideration, simply upon the agreement that he shall sell the same and turn the proceeds over to the corporation it is void by the constitution and the statutes; the effect of such an issue is to leave the stock so improperly issued in the treasury as completely as though no void certificate had been issued therefor; that is if no innocent party has acquired any rights on the faith of the issue.[16] This may have been *dictum* in this particular case, but this declaration is undoubtedly sound law.

This section of the constitution applies also to creating a bonded debt of street railroad corporations,[17] notwithstanding sections 456 and 457 of the Civil Code.

BONDS MAY BE SOLD AT A DISCOUNT

The courts say that there is no statute, or rule of public policy, forbidding a corporation selling its bonds below par; they are not a part of the "trust fund" of a corporation, and, the corporation being a "going concern," creditors can not object.[18] In this case bonds and stock were sold together, under a fiction that the stock was being paid for, at par, and the bonds were given as a bonus. Nor does the fact that the corporation is not able to pay its debts as they fall due, its assets being sufficient for that purpose, raise any presumption of fraudulent intent.

How far the stock was paid up was not raised, nor how that could be ascertained, although alluded to.

16 Cortelyou v. Imperial Land Co., 156 Cal. 373-376, 104 Pac. 695.

17 Boyd v. Heron, 125 Cal. 454, 58 Pac. 64.

18 McKee v. Title Ins. etc. Co., 159 Cal. 206, 113 Pac. 140.

DISCORDANT DECISIONS

Strange discords vex in the decisions interpreting these two sentences of the constitution.

It is clear that the word "fictitious," found only in the first, means that the consideration for which stock is issued shall not be fictitious, imaginary, or non-existent; for, stock itself can not be imaginary or non-existent. Both sentences have been declared to be mandatory and prohibitory. The first sentence declares all "fictitious increases" of stock or bonds void; the second relates to procedure for all increases, but does not declare that the failure to follow such procedure shall make the issue void.

The court, in construing even the first sentence, says "void" may sometimes mean only "voidable," like in a statute, and that any value, no matter how insignificant, may make the stock valid.[19]

Yet the court says the failure to observe only one of the requirements of this method of procedure renders the stock, no matter how *bona fide* or honest, "absolutely void" (Navajo v. Curry, *supra*), saying that a constitutional prohibition is greater in effect than a statutory one, thus establishing two methods of construing the English language.

The first sentence protects the *bona fide* investor and the public; the second is only procedure in the interest of the stockholder. Estoppel may often be pleaded, when necessary, to prevent the corporation and stockholders from plundering the investors.[20]

[19] Turner v. Markham, 155 Cal. 562, 102 Pac. 272, and cases cited therein, and in the preceding notes.

[20] McKee v. Title Ins. Co., 159 Cal. 206, 223, 113 Pac. 140.

CHAPTER VI

INCREASING OR DIMINISHING CAPITAL STOCK CREATING OR INCREASING BONDED DEBT

Section 359 of the Civil Code is as follows:

§ 359. No corporation shall issue stocks or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness is void.

Every corporation may increase or diminish its capital stock, and every corporation, or two or more corporations, may create or increase its or their bonded indebtedness, subject to the following provisions:

First—The capital stock of a corporation may be *increased* or *diminished* at a meeting of the stockholders by a vote representing at least *two-thirds* of the *subscribed or issued* capital stock, or in the manner otherwise in this section provided;

When by meeting as aforesaid, then such meeting must be called by the board of directors or trustees, and notice must be given by publication in a newspaper published in the county or city and county where the principal place of business of the corporation is located, or if there be none published in said county or city and county, then in a newspaper published in an adjoining county, or city and county, such paper to be designated by the board of directors or trustees in the order calling for the meeting;

Provided, however, that where the Articles of Incorporation provide for *two or more kinds* of capital stock, no increase or reduction of capital stock shall be made without the assent of *two thirds* of *all the subscribed* stock, and in making such increase or reduction, the assent shall identify the particular class or classes of

stock to be increased or reduced, and the amounts apportioned to each.

Second—The notice must specify the object of the meeting and the amount to which it is proposed to increase or diminish the capital stock, the time and place of holding the meeting, which latter must be at the principal place of business of the corporation and at the building where the board of directors or trustees usually meet. The notice herein provided must be published once a week for at least sixty days. The capital stock can *not be diminished* to an amount *less than* the *indebtedness* of the corporation.

Third—The bonded indebtedness of a corporation may be *created or increased* by a vote of the stockholders representing at least *two-thirds* of the *subscribed or issued* capital stock at a meeting called by the board of directors or trustees, and after notice of the time and place of the meeting published in the same manner and for the time prescribed.

Which notice shall state the amount of the bonded indebtedness which it is proposed to create, or the amount to which it is proposed to increase such indebtedness, and shall in all other respects contain the same matters as are above provided and set forth in the notice of meeting to increase or diminish the capital stock; or such original creation of bonded indebtedness may be made as otherwise in this section provided.

Fourth—In addition to the notice by publication, when proceedings are to be had hereunder at a meeting of stockholders, the secretary of the corporation shall also address a notice to each of the stockholders whose names appear on the company's books as sufficiently addressed or identified, at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate, which notice shall be so mailed to such stockholders at least thirty days before the day appointed for such meeting.

Fifth—In *lieu* of such *call* for *meeting* of stockholders and of such notice and publication of the same and of a stockholders' meeting held in pursuance thereof and of said vote thereat representing at least *two-thirds* of the *subscribed* capital stock, any corporation may *diminish* its *capital* stock and also *originally create* its *bonded indebtedness* by a resolution adopted by the unanimous vote of its board of directors or trustees at a regular meeting or at a special meeting called for that purpose and *approved* by the written assent or assents of the stockholders holding *two-thirds* of the *subscribed or issued* capital stock, which assent or assents must be filed with the secretary of the corporation;

But the secretary of the corporation must address by mail, postage fully prepaid, a copy of such resolution to each of the stockholders whose names appear upon the company's books as sufficiently addressed or identified, at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate, which notice shall be so mailed to such stockholders at least thirty days before the certificate hereinafter provided is made and signed or filed, as hereinafter provided, and within that time any *stockholder* may file with such secretary his *dissent in writing;*

But it is further provided that if at any time within said thirty days such written assent ar assents of the stockholders holding all of the subscribed or issued capital stock be so filed with said secretary, then and at once and without further delay the certificate hereinafter provided for may be so made, signed and filed as hereinafter provided and with the same effect, but such capital stock can not be diminished to an amount less than the indebtedness of the corporation, and *no increase of capital stock* or *bonded indebtedness* can be made, *except at a meeting of stockholders* as in this section provided.

Sixth—[CONSOLIDATED INDEBTEDNESS.] Any two or more corporations may by a separate compliance by each corporation with the provisions of this section applicable in the premises in respect to creating or increasing bonded indebtedness, create or increase a consolidated bonded indebtedness of such corporations, to be binding jointly and severally on such corporations, and which may be secured by a consolidated mortgage or deed of trust executed by all such corporations, mortgaging or conveying in trust all or any of the properties of all such corporations, acquired or to be acquired.

Seventh — [CERTIFICATE OF CHANGE.] Upon such increase or diminution of the capital stock or creation or increase of the bonded indebtedness being made in accordance with the provisions of this section there shall be made, if proceedings are had under subdivision first, second, third and fourth above, a certificate under the corporate seal and signed by the president and secretary of the corporation or of each corporation acting in the premises and a majority of the directors or trustees of such corporation, or each corporation so acting, showing a compliance by such corporation, or each corporation so acting, with the requirements of said last named subdivisions and the amount to which the capital stock has been increased or diminished or the amount of the bonded indebtedness created, or to which the bonded indebtedness may have been increased, and the amount of stock represented at the meeting and the total vote in the affirmative by which the same was accomplished and the total vote in the negative;

Or if such proceedings be had and taken under subdivision fifth of this section as to diminution of capital stock or original creation of bonded indebtedness a like certificate shall be made and sealed and signed, as aforesaid, showing a compliance by such corporation, and by each corporation acting in the premises, with the requirements of said subdivision fifth, and the

amount to which the capital stock has been diminished or the amount of bonded indebtedness so originally created, and the total amount of the stock represented by the said written assent or assents so filed with the secretary and the total amount of stock represented by the said written dissent or dissents so filed.

In case of a consolidated bond of indebtedness each corporation which is a party thereto shall cause to be made and signed and sealed and verified and filed, as in this section provided, a separate certificate.

Eighth—[CERTIFICATE FURTHER STATES.] In all cases the certificate shall state the total number of *subscribed or issued shares* of the capital stock of the corporation, or of each corporation respectively acting in the premises, and shall be *verified* by the *oath* of the said *president* and *secretary*, or of the said respective presidents and secretaries. Such consolidated bonded indebtedness may be created or increased to an amount equal to the par or face value of the aggregate amount of the *subscribed* or *issued* capital stocks of said two or more corporations, but shall not exceed such aggregate amount.

[FILING CERTIFICATE.] In each and every case the certificate must be filed in the office of the clerk in the county or city and county where the original Articles of Incorporation of the corporation or corporations acting hereunder are filed and a certified copy thereof, certified by such clerk, shall be filed in the office of the secretary of state; and thereupon the capital stock shall be so increased or diminished, or the bonded indebtedness or consolidated bonded indebtedness shall be created or increased accordingly,

[CONCLUSIVE EVIDENCE.] And such certificate or certificates so filed shall be, when said certified copy or copies are so filed, conclusive proof of such increase or diminution of capital stock or such creation or increase of bonded or consolidated bonded indebtedness and the validity of each thereof.

[NEWSPAPERS.] When the by-laws of a corporation prescribe the paper in which notices of meetings of directors or trustees or stockholders are to be published the notices of publication herein provided for shall be published in such paper, unless publication thereof shall have ceased. (Amended March 18, 1907; Stats. 1907, p. 349.)

The methods provided by the statutes of nearly every state in the Union for accomplishing the above objects are very simple and expeditious. They should be so. The foregoing section of the Civil Code has no parallel in any other state; it is an anomaly. What good object its elaborate and delicate machinery, its cloud of technical details, and its tedious process serve, is not apparent from carefully studying it, or observing its operation, and we have heard no favorable argument of any moment advanced. The many reasons against such complicated machinery are obvious to every one, especially to lawyers and business men having anything to do with the legal affairs, or with conducting the business of corporations. These provisions are conspicuous in accomplishing one object, however, that is, in making investment in these securities hazardous and spreading snares for the unwary. They inspire so much fear of some slip or irregularity that resort is sometimes had, in advance of the issue, to what is called a test case (almost a moot case) to get an expression of the opinion of the courts to avoid great losses. The Market St. Railway case, cited *supra,* is an example. In the matter of municipal bonds such cases are very numerous.

The first clause of this section prohibiting stocks or bonds being issued except for money paid, labor done, or property actually received, and declaring all fictitious increase of stock or indebtedness void, is the same as the constitutional provision on that subject,

and reference is made to the consideration of that section of the constitution.[1]

A marked distinction is drawn in the decisions between the method of the creation of an original issue of stock or bonds, and of an increase of them. As to the manner of the authorization by the stockholders of an increase of either, the constitution requires that it be done at a meeting of the stockholders after sixty days' public notice, etc.

An *increase* of stock, after the organization of the corporation, was made by the unanimous consent in writing and the unanimous vote of a stockholders' meeting, following exactly the proceedings prescribed in section 359 of the Civil Code; but the secretary of state refused to file the certificate of the increase, and in mandamus proceedings to compel him to do so, the court said that the last clause of article 12, section 11 of the constitution requiring *sixty days' public notice* of the meeting of stockholders at which the increase was proposed to be ordered is mandatory and self-executing, and that the failure to give this notice rendered the attempt to increase the capital stock absolutely void, and dismissed the proceeding.[2] No rights except those of stockholders were involved, and they were all consenting. If there had been any creditors they would have been benefited and not injured. In the next case,[3] this sixty days' public notice is said not to be necessary in the creation of the *first indebtedness* of a corporation, even if one-third of the stockholders object, and irrespective of creditors, no matter how many there may be.

1 Const., Art. 12, Sec. 11.

2 Navajo etc. Co. v. Curry, 147 Cal. 581, 582, 109 Am. St. Rep. 176, 82 Pac. 247.

3 Merced etc. Co. v. Curry, 157 Cal. 727, 728, 109 Pac. 264.

In the latter case a corporation organized with an authorized capital of two million dollars, of which only twenty-five hundred dollars were subscribed, executed a certificate in conformity with this section 359 of the Civil Code for the creation of a bonded indebtedness of $1,500,000, this being the first attempt by the corporation to create a bonded indebtedness. The secretary of state refused to file it and mandamus was brought to compel him to do so, as in the Navajo case, *supra.* The court said the proceedings were not in violation of article 12, section 11 of the constitution, that the latter section "merely declares that all fictitious indebtedness of a corporation shall be void and that the bonded debt thereof shall not be *increased,* except . . . at a meeting duly called upon sixty days' notice. No fictitious debt is here proposed, nor an 'increase' of the bonded debt. There is no existing bonded debt, and the corporation proposes to 'create' one, not to increase a bonded indebtedness already in existence," and said that the code section above provides the method for creating the original bonded indebtedness, and that the constitution does not require a meeting of the stockholders, nor sixty days' public notice "to *create* an *original* bonded debt," and does not apply to such a case as this.[4] It was said that while the code section above prohibits directors creating any debts beyond the subscribed capital, no bonded debt is created by this certificate; it is a "mere authorization to the officers of the company to prepare, sign and seal bonds of the company to the stated number and amount, ready for sale and delivery, whenever such delivery may become lawful by reason of subscriptions for the required amount. The debt represented by any bond would *not* exist nor be *created* until the bond is *issued*

4 To same extent also, McKee v. Title Ins. etc. Co., 159 Cal. 206, 222, 113 Pac. 140.

by the company, that is, delivered to a third person for a valuable consideration." All that is necessary is that a "sufficient amount of stock is subscribed as the bonds are sold and delivered."

It was admitted in the Navajo case, *supra,* that in harmony with the decisions of the courts of other states, the provision for sixty days' public notice would be held immaterial on the facts in that case, were it not that article 1, section 22 of the constitution declares that its provisions are mandatory and prohibitory. It would seem that the maxim, *de minimis,* should sometimes be called in to relieve the law of irrational conclusions.

The court has said of Civil Code, sec. 359, "there is no provision that such bonds not issued in conformity therewith shall be void, either in favor of creditors or at all." No attempt was made to comply with the provision of the above section of the Civil Code (the corporation was a foreign one), but it received the money and it inured to the benefit of all, and there was no fraud, the stockholders were not objecting, and only the creditors were attacking the validity of the bonds. The court said, even conceding that the corporation was under the same obligation to comply with this section as a domestic corporation "the failure to observe its requirements does not make the bonds void at the option of creditors . . . the corporation is therefore estopped to dispute the validity of the bonds and the creditors are likewise bound thereby."[5] In the case of an *increase* of stock or bonded indebtedness, the provisions of the constitution that "sixty days' public notice" and that the proceedings be had at a "meeting" of the stockholders are no more mandatory than

[5] McKee v. Title Ins. etc. Co., 159 Cal. 206, 220-222, 113 Pac. 140, quoted with approval in Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 375, 141 Pac. 399.

the provisions of Civil Code, sec. 359, nor does the constitution declare that for such failure the bonds shall be void, but the same section does declare "fictitious increases" void. The court said in McKee v. Title Ins. Co. that this section "being a restriction of the inherent right to contract is not to be unnecessarily extended beyond its fair import," and in the Navajo case that this provision of the constitution is "unduly rigorous," and intimates if it were a statute the decision probably would have been different, and admits that the supreme court of Missouri held a similar provision of the constitution of that state sufficiently fulfilled by the facts shown in the Navajo case. It will be observed that the Navajo case was an attempt to increase stock and that it was not yet out in the hands of *bona fide* purchasers; whether bonds already out and in the hands of innocent purchasers would be held void has not yet been decided.

In the absence of a showing of the foreign law on this point, the same rules in regard to frequency of publication will apply to foreign statutes as to domestic.[6]

It is not necessary that the resolution of the board of directors required in subdivision 5 of this section to create a bonded indebtedness should be adopted by the unanimous vote of all the directors who are members of the board; the vote of all the members present at the meeting, a quorum being present, is sufficient.[7]

Dividing the capital stock into common and preferred shares, by an amendment, without increasing or diminishing the number of shares or the par value thereof, is not an increase or diminution of the capital stock,

[6] Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191; see case for rule as to frequency and time to be continued.

[7] Tidewater etc. Co. v. Jordan, 163 Cal. 105, Ann. Cas. 1913E, 1293, 41 L. R. A. (N. S.) 130, 124 Pac. 716.

within the meaning of this section, although it operated to increase or diminish one of the classes of stock.[8]

A conversion of stock made by a corporation by refusing to transfer stock on its books is not a reduc tion of its capital stock, for it may be reissued,[9] although it was said that a purchase by a corporation of its own stock is a reduction of its capital stock;[10] but such stock also may be reissued.

Under a statute concerning the sale of mining ground, which required the assent of two-thirds of the stock, quite similar to the requirements of this section, it was held that the law did not require the evidence of this ratification to be attached to the mortgage—it became complete upon the adoption of the resolution by the stockholders—and that the secretary's certificate of its adoption is for convenience of proof, and its *prima facie* character yields to the production of the original record of its adoption;[11] and in another case[12] under the above law where the directors had passed no prior resolution for the creation of the mortgage, although the required number of owners of stock had properly consented to the mortgage, it was held that a subsequent resolution of the directors levying an assessment to pay the mortgage did not amount to a ratification of the mortgage. As both actions were within the province of the directors alone, this is

8 California Telephone etc. Co. v. Jordan, 19 Cal. App. 536, 126 Pac. 598.

9 Ralston v. Bank of California, 112 Cal. 208-214, 44 Pac. 476.

10 Tulare Irr. Dist. v. Kaweah Canal etc. Co., 5 Cal. Unrep. 330, 44 Pac. 662. See Hammond v. Haskell, 14 Cal. App. 522, 112 Pac. 575.

11 Middleton v. Arastraville, 146 Cal. 219, 225, 79 Pac. 889.

12 Alta Silver etc. Co. v. Alta Placer etc. Co., 78 Cal. 629, 633, 21 Pac. 373.

exalting the form above the substance so frequently found in corporation cases.

If the terms of the mortgage go beyond the matters authorized in the resolution of the directors, such as a provision for attorneys' fees, the mortgage is not invalid, but only the provision as to attorneys' fees.[13] But if the resolution, although silent on the subject of attorneys' fees, states the mortgage is to be in the form submitted, and that form contained a provision for attorneys' fees, that provision in the mortgage is valid.[14]

There are no other decisions on the provisions of this section, and, of course, no light can be found in the decisions in other states. Business men conducting the affairs of corporations, and lawyers whom they must call in to aid them, have no guide to pilot them through the intricacies of this section, at least not until some genius shall invent something for it like the "educated stick" in mathematics.

DECLARING DEBT DUE ON INTEREST DEFAULT

There has been only one decision in this state where was involved the right to make the election to declare the principal due on account of a default in the payment of interest, where the debt was divided into many bonds. The value of this decision is greatly diminished, however, by the fact that all of the bonds were owned by one person, thus eliminating the reciprocal relations and duties where the bondholders are nu-

13 Schallard v. Eel River etc. Co., 70 Cal. 144, 147, 11 Pac. 500; and where the resolution did not expressly authorize the officers to contract to pay attorneys' fees in case of suit thereon, such a provision in the notes was invalid. Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 413, 117 Pac. 1041, 1046.

14 Hubbard v. University Bank, 125 Cal. 684, 58 Pac. 297.

merous—which fact calls up many other equitable questions and rights.

In this case,[15] the trust deed provided on default of payment of matured interest coupons, the whole amount of the principal might, at the election of the trustee, be declared due, and further that in such a case, the holders of one-fourth of the bonds might, upon indemnifying the trustee against loss, expense, etc., on that account, demand and require the trustee "to take such action pursuant to the terms of the trust deed as the party or parties tendering the indemnity may in writing request," and further provided that "no bondholder or bondholders shall take any proceedings to enforce the provisions hereof until he shall have requested the trustee in writing to take proceedings and shall have tendered to the trustee satisfactory indemnity as hereinbefore provided, and the trustee shall have refused or neglected after the lapse of a reasonable time to take such proceedings." Default having been made in the payment of the interest coupons, demand was made upon the trustee that it declare the principal also due, and that it institute proceedings to foreclose the mortgage, or to sell the property therein conveyed under the power of sale therein contained and, in this written demand, offer was made to indemnify the trustee in such manner as it might require against loss, expense, etc., by reason of such foreclosure and sale. The trustee refused to comply with this request and demand. The bondholder, there being only one, thereupon brought suit to foreclose the trust deed for both principal and interest. The district court of appeal said that the words last quoted above "are equivalent to a statement that after such request and refusal the bondholders referred to may proceed in some appropriate manner to enforce the provisions of

[15] Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 378, 141 Pac. 399.

the trust deed," and that such provisions "included the right to enforce payment of the entire debt" upon the bondholders complying with the conditions stated, if the trustee refused to proceed. The court said further, "under the circumstances, the rights of the bondholder should not be allowed to fail by reason of the refusal or omission of the trustee to perform its duty. The court should put itself in the place of the trustee and, on the demand of the bondholder, should exercise its power to enforce those rights."

As decisions are authority only upon the facts of the case therein, this decision is not decisive of a case where there is a multitude of other bondholders whose rights would be affected by such proceedings and who are opposed to such action. The doctrine of the supreme right of the individual to do what he pleases with his own, where he enters into an enterprise with many others, as bondholders do, and where any action he may take involves or imperils the rights of his associates, or will accomplish results to which the others are opposed, is being much modified, and ultimately will be entirely taken away, as it should be. Without special provision in the trust deed, the bondholder can sue only for his interest and not even for that to the detriment of his co-bondholders' security;[16] by a sort of common consent it is understood that a majority of the bondholders control the institution of such proceedings, and when such a suit is brought it must be for the benefit of all. Already the supreme court of the United States has said,[17] that in these

[16] Pennock v. Coe, 64 U. S. 117, 6 Law Ed. 436; New Orleans etc. Ry. Co. v. Parker, 143 U. S. 42, 59-60, 36 L. Ed. 66, 71, 12 Sup. Ct. 364.

[17] Louisville Trust Co. v. Louisville etc. R. Co., 174 U. S. 674, 682, 43 L. Ed. 1130, 1133, 19 Sup. Ct. 827. Other decisions by that court of interest in such cases are: Chicago etc. R. Co. v. Fosdick, 106 U. S. 47; 27 L. Ed. 47, 1 Sup. Ct. 10; Elwell v.

cases "other inquiries arise" than those in a foreclosure of ordinary mortgages on real estate, which are simple, and where usually only two persons are concerned.

Our own court, by decision of the commission, affirmed in department, has gone to remarkable length in supporting the individual's right to foreclose by action independent of his associates.[18] There the right of a single bondholder to foreclose the mortgage for the whole debt on account of failure to pay interest, the principal not being due, was upheld. The Fosdick case is cited in support, but a careful reading of that decision discloses the fact that it is opposed rather than supporting, for it is there decided that where the trust deed contains the usual "majority clause" a single bondholder can not elect to declare his or the whole principal due and foreclose to recover it; and further, that if the trustee had rightfully declared the principal sum due, nevertheless "without proof of the fact that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds" the suit fails.

It is not disputed that, without a special provision in the bonds or mortgage enabling the trustees or a majority of the bondholders, or a less number, or even

Fosdick, 134 U. S. 500, 33 L. Ed. 998-1002, 10 Sup. Ct. 598; Morgan's etc. S. S. Co. v. Texas etc. Co., 137 U. S. 171, 34 L. Ed. 632, 11 Sup. Ct. 61; Guaranty Trust etc. Co. v. Green etc. R. Co., 139 U. S. 137, 35 L. Ed. 116, 11 Sup. Ct. 512; New Orleans etc. Ry. Co. v. Parker, 143 U. S. 42, 36 L. Ed. 66, 12 Sup. Ct. 364; Shaw etc. R. Co. v. Little Rock etc. R. Co., 100 U. S. 605, 612, 25 L. Ed. 757, 759; First Nat. Bank v. Shedd, 121 U. S. 74, 87, 30 L. Ed. 877-882, 7 Sup. Ct. 807. No attempt is made here to cite all cases of interest on this subject, but these citations will lead to others.

18 Citizens Bank etc. v. Los Angeles etc. Co., 131 Cal. 187, 82 Am. St. Rep. 341, 63 Pac. 462.

one, to declare the principal due upon failure to pay interest, no one has such power.

In a later case[19] some of these questions were secondarily involved in determining whether certain coupons were barred by the statute of limitations, they being more than four years past due. The trustee had declared the principal due and was suing to foreclose the mortgage for the whole debt. The supreme court, in department, said that the coupons were barred because more than four years before the suit was brought the holder had the right to enforce payment of them "by action of foreclosure." But if this can be done, upon which question the supreme court of the United States says it expresses no opinion, it says that it can not be done without bringing in every other bondholder, for each bondholder is interested in diminishing the debt of every other bondholder, and in protecting the security at the sale, for this security is held for the benefit of all.[20]

It will be readily perceived that such a suit is very different in character from the usual suit brought by the trustee to foreclose.

SELLING PROPERTY AS A WHOLE

A case arose where the property mortgaged was located partly in this state and partly in Mexico, but "formed a single and indivisible unit" (an irrigation system), and "dismemberment of the system would destroy or greatly impair the usefulness of its component parts." It had been previously decided that the property was not charged with a "public use or service." The court ordered the property, notwith-

19 California Safe etc. Co. v. Sierra etc. R. Co., 158 Cal. 690, Ann. Cas. 1912A, 729, 112 Pac. 274.

20 New Orleans etc. Ry. Co. v. Parker, 143 U. S. 42, 59-60, 36 L. Ed. 66, 71, 12 Sup. Ct. 364.

standing, to be sold as a whole. The case was complicated by the additional fact that subsequent liens were upon different parts of the system. The court below was directed to make an appraisement of the whole, and of the several parts, and the subsequent lien holders were to be given their pro rata parts according to that appraisement of the balance remaining after payment of the first mortgage bonds.[21] The decision was supported wholly by federal court decisions, the case being one of first impression in our courts.

TRUSTEE REPRESENTS ALL BONDHOLDERS

In the very recent case, cited above, we have the first declaration by our own courts that the trustee in an instrument securing a large number of bonds is, in a suit to foreclose the same, the representative of all bondholders who do not formally intervene, and that all bondholders are bound by its *bona fide* acts.

RECEIVER'S CERTIFICATES

In the same case it was decided, although the corporation was a "private rather than a quasi-public" one, that receiver's certificates issued for the care and preservation of the property were legal, even if a part of the funds so realized were expended upon that part of the property beyond the jurisdiction of the court, it being shown that the preservation of the property in Mexico was necessary to preserve the property located in California.

CONSOLIDATION OF DEBTS

In most of the states, especially in the eastern part of the United States, provision is made for the consolidation of all kinds of business corporations, and consolidation of debts of different corporations is

[21] Title Ins. and T. Co. v. California Dev. Co., 171 Cal. —, 152 Pac. 555.

usually effected through such consolidations. But in this state consolidation of corporations is limited to colleges, railroads and mining corporations, and therefore is a subject of limited interest. The statutes on these subjects are found under their appropriate heads; that governing mining corporations being found in section 587a of the Civil Code. Naturally the decisions on this subject in this state are few, and confined to those three classes of corporations.

Under the railroad corporation law it is held that the articles of consolidation themselves constitute the new Articles of Incorporation and it is these which should be filed with the secretary of state.[22] In the consolidation of the street railroads of San Francisco,[23] it was held that only three-fourths of the outstanding stock of each constituent corporation was required to consent to the consolidation and not three-fourths of the nominal stock of each, and that trustees of stock could give such consent, and that the new corporation could be organized to exist for fifty years without regard to the time of expiration of any of the constituent corporations.

Kohl v. Lilienthal,[24] a mining corporation case, sometimes classed as a consolidation case, was not strictly so, but a case of one corporation buying the property of another and issuing its stock to the latter corporation in payment for the property. The legality of such a proceeding can not be questioned; the controversy in this case arose out of the attempt of the vendor corporation to distribute the stock so received as a

22 California Southern R. Co. v. Southern Pacific R. Co., 67 Cal. 59, 7 Pac. 123; California Central Ry. Co. v. Hooper, 76 Cal. 404, 406, 18 Pac. 599.

23 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

24 Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

dividend to its stockholders. The court held this could not be done as that would be really dividing its "capital" among its stockholders, which is forbidden by the statute.

Before the passage of the statute expressly authorizing the consolidation of mining corporations it was intimated,[25] but not decided, that it would not be unlawful for two such corporations to form a new corporation and convey all their property to it, provided the new corporation assumed all the obligations of the old corporations. But it was held that the stock of the new corporation could not be issued directly to the stockholders of the old corporations.

Where a water company, supplying water to a city, buys the property of another company supplying water to the same city under less favorable terms than the purchasing company which, by its charter, was entitled to as favorable terms as should be granted to another corporation, the purchasing company will not be held limited to the former more unfavorable rates.[26]

And if a new corporation takes over, or purchases all of the property of another corporation and the latter has debts, the new corporation will be regarded as a continuation of the old and will be held liable in equity for the debts of the old to the extent of the value of the property so received by it.[27]

25 Martin v. Zellerbach, 38 Cal. 300, 318, 99 Am. Dec. 365.

26 San Francisco v. Spring Valley Water Works, 48 Cal. 493.

27 Blanc v. Paymaster M. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; San Francisco etc. R. Co. v. Bee, 48 Cal. 398; Higgins v. California Petroleum etc. Co., 122 Cal. 373, 376, 55 Pac. 155; s. c. 147 Cal. 363, 81 Pac. 1070; Schaake v. Eagle etc. Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; dictum in Koch v. Speedwell etc. Co., 24 Cal. App. 123, 140 Pac. 598, 600; but assuming the same name and engaging in the same business raise no presumption of identity. Substantially to the same effect, Atkinson v. Western Dev. Co., 170 Cal. —, 150 Pac. 360, 363.

But there can be no novation of the indebtedness without the consent of the creditors, but the creditors may elect to hold the new corporation only.[28]

It will be observed that in none of these cases, except in Market St. R. R. v. Hellman, *supra,* were there any proceedings to form consolidations of corporations, in the strict sense of the word, all being purchases of all the property of one corporation by another.

In the case of Los Angeles street railroad corporations, there was a real consolidation under the railroad law.[29] It was said that such a consolidation does not relieve either of the old companies of their liabilities, and that while an agreement of the consolidated company assuming all of the debts of the old companies does not bind the creditors of the old companies without their assent, yet the bringing of a suit against the consolidated corporation by a creditor on his claim against one of the old companies is sufficient acceptance by the creditor of the new debtor for the old. The new company is liable the same as if it had been the original actor in the transaction.

[28] Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[29] Smith v. Los Angeles etc. Ry. Co., 98 Cal. 210, 33 Pac. 53.

CHAPTER VII

ALIENATION OF FRANCHISE

Article 12, section 10 of the constitution is as follows:

> The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges.

Before the adoption of this provision it was decided that a ditch company supplying water to the public could sell its ditches, for the only franchise possessed by that corporation was the franchise of being a corporation.[1] In a very recent case it was held that a water company supplying water to a city could sell its physical property and be relieved of further obligations to supply water to the city, but the physical property would be taken by the purchaser charged with this burden. The court says that it is the settled law that a transfer of property used in a public service can not be conveyed by one corporation to another corporation, although the grantor has power to convey, if the grantee corporation does not have the power to continue the public use to which the property is devoted—in that case the conveyance would be binding on neither party—and that by this grant the corporation could not relieve itself of this personal duty without the consent of the proper public authority, but that section 361a of the Civil Code and other statutes give this consent; the agent in charge of the property and use being changed, the new agent must continue to devote

1 Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 588, 99 Am. Dec. 300.

the property to the same use.[2] This appears to be a very strained construction of the section.

A franchise to lay pipes in the streets of a city to supply the inhabitants with gas for lighting is an incorporeal hereditament, real estate in the nature of an easement, inseparably annexed to the soil and may be taxed where located.[3] And in the case of a wagon road, chartered in the early days of this state by the legislature, its franchise was held not only to be real property, but also that it could be sold by the person and "associates" to whom it was granted, and descended to their heirs, and no consent of the state was necessary (no such restriction being contained in the grant) to such sale, nor was it a personal trust, distinguishing same from certain ferry franchises which had been so held.[4]

TRANSFERRING WHOLE PROPERTY AND FRANCHISE

Section 361a of the Civil Code reads as follows:

> **§ 361a.** No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof holding of record at least two-thirds of the issued capital stock of such corporation;
>
> Such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by vote at a stockholders' meeting of such corporation called for that purpose;

2 South Pasadena v. Pasadena etc. Co., 152 Cal. 579, 586, 93 Pac. 490. As to the decisions on section 361a of the Civil Code, see post.

3 Stockton Gas etc. Co. v. San Joaquin County, 148 Cal. 313, 7 Ann. Cas. 511, 5 L. R. A. (N. S.) 174, 83 Pac. 54.

4 People v. Lawley, 17 Cal. App. 331, 341, 119 Pac. 1039.

> But with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid;
>
> Provided, however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers, or conveyances of corporate property other than those hereinabove set forth.

At common law a franchise could not be alienated, and it was not subject to execution or to attachment in a suit at law. Equity was the only power which could reach it. In an early case in this state it was said that the franchises of a corporation are privileges granted and held in personal trust, and can not be transferred by forced sale, or by voluntary assignment, except by permission of the state, and when that permission is granted the mode of transfer provided must be followed.[5] A sale by a corporation of all of its property and franchises, except its franchise to be a corporation, does not carry with it the shares of its own stock held in its treasury.[6]

This disability of selling the franchise of a corporation is not one of *ultra vires,* but arises from public policy, and such a sale is totally void in all respects, incapable of ratification, and no estoppel can arise.[7] In one case,[8] however, it was held that the recognition by the county supervisors of an assignment was sufficient consent, but this is opposed to all principle and authority, for it is the state, and not some sub-

5 Wood v. Truckee etc. Co., 24 Cal. 474; People v. Duncan, 41 Cal. 507, 511; Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199.

6 Tulare Irr. Dist. v. Kaweah Canal etc. Co., 5 Cal. Unrep. 330, 44 Pac. 662.

7 Visalia Gas etc. Co. v. Sims, 104 Cal. 326, 330, 43 Am. St. Rep. 105, 37 Pac. 1042; Gallagher v. Equitable Gas etc. Co., 141 Cal. 699-706, 75 Pac. 329.

8 Carter v. Meuli, 122 Cal. 367, 369, 55 Pac. 138.

ordinate division of it, which possesses so great and important a power.

The act "for the further protection of stockholders in mining companies" (Stats. 1880, p. 131, as amended in Stats. 1897, p. 96; now repealed, Stats. 1905, p. 74) declared that it should be unlawful for a mining company to dispose of any part of its mining ground, without the ratification of at least two-thirds of the holders of its stock. It was held that this provision limited the power of the directors, and that without such consent no title would pass, and also that this question could be raised by any one "who connects himself with the title . . . as well as by the stockholders."[9]

But the language of that act is quite different from that of this section, and that fact is made conspicuous by a decision lately handed down by our supreme court. The case presented was of the directors of a racing association (a corporation) selling all of its land, its only tangible asset, without the consent of its stockholders. The sale was held, notwithstanding, to be valid, because the corporation did not also sell its "business"; it being said that the corporation could still continue its business of conducting racing, and might buy or lease other land for that purpose.[10] The

9 McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Pekin Min. etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; Granite Gold Min. Co. v. Maginnes, 118 Cal. 131-137, 50 Pac. 269; Johnson v. California etc. Co., 127 Cal. 283, 59 Pac. 595; Lacy v. Gunn, 144 Cal. 511-515, 78 Pac. 30; Bennett v. Red Cloud etc. Co., 14 Cal. App. 728, 113 Pac. 119; Williams v. Gaylord, 186 U. S. 157, 164, 46 L. Ed. 1102, 1106, 22 Sup. Ct. 798.

10 Shaw v. Hollister etc. Co., 166 Cal. 257, 135 Pac. 965. See Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 139 Pac. 91, decided just before this case. And a lease of only a part of the corporation's property does not come within the restrictions of this section, Seal of Gold Min. Co. v. Slater, 161 Cal. 630, 120 Pac. 15.

same reasoning puts the franchise to exist as a corporation in the same category as "business," and the sale by a corporation of its franchise to exist (if that could be done) is almost never necessary or attempted to be done; therefore this section becomes of slight importance.

And a conveyance by one corporation of all of its physical property to another corporation (one person owning substantially all the stock of both corporations) in consideration of the latter corporation assuming all of the debts of the former is based on a valuable consideration and is not void as to creditors under section 3442 of the Civil Code; nor is the fact that such transfer was made in order to give the federal courts jurisdiction of suits brought thereafter evidence of fraud.[11]

In the consolidation of several street car lines, section 473 of the Civil Code providing that it might be done on the "written consent of three-fourths in value of all the stock of each corporation," it was held that this meant three-fourths of all the "subscribed or issued or outstanding shares," and not that fraction of the total authorized stock.[12] But it will be observed that even this statement is itself indefinite and uncertain.

In a recent case, as we have seen, it was held a corporation supplying water to a city could sell all of its property to another corporation, and, if the city consents thereto, be relieved of all further responsibility; that this section of the code gives that power.[13]

11 Manning v. App. etc. Min. Co., 171 Cal. —, 154 Pac. 301.

12 Market St. Ry. Co. v. Hellman, 109 Cal. 571-578, 42 Pac. 225.

13 South Pasadena v. Pasadena etc. Co., 152 Cal. 579, 586, 93 Pac. 490. So of a lease of its entire property, McTigue v. Arctic etc. Co., 20 Cal. App. 708, 714, 130 Pac. 165.

FRANCHISE, SALE OF ON EXECUTION

Section 388 of the Civil Code is as follows:

> § 388. For the satisfaction of any judgment against any person, company, or corporation having any franchise other than the franchise of being a corporation, such franchise, and all the rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with the same effect, as any other property. (Amended March 20, 1905; Stats. 1905, p. 409.)

A franchise is a privilege only and can not be transferred without the authority of the state; nor can it be sold on execution.[14] But this rule does not apply to the cars, trucks and supplies of a street railway company; such property does not emanate directly or indirectly from the state and has no character of a public trust and is subject to attachment or execution in like manner as other property not exempt by statute.[15] But a right of way of a wagon or railroad, even if owned in fee, is incident and necessary to the public use, and may be sold under execution under this statute[16] (now doubtful law); without the statute it could not. And an action to quiet title, or even ejectment, may be maintained to recover it, although ordinarily this can not be done for an easement,[17] and no title by prescription can be acquired to any part of

14 Gregory v. Blanchard, 98 Cal. 311-313, 33 Pac. 199; Munroe v. Thomas, 5 Cal. 470; Thomas v. Armstrong, 7 Cal. 286; Wood v. Truckee Turnpike Co., 24 Cal. 474, 487; People v. Duncan, 41 Cal. 507, 509.

15 Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94-97, 68 Am. St. Rep. 54, — Pac. 529.

16 Welch v. Plumas County, 80 Cal. 338-340, 22 Pac. 254.

17 Ibid, and Southern Pacific Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; Fresno etc. R. Co. v. Southern Pacific R. Co., 135 Cal. 202, 67 Pac. 773; and descends to heirs, People v. Lawley, 17 Cal. App. 331, 119 Pac. 1089.

the right of way adverse to the franchise of a public use.[18]

This section of the statutes is not well expressed; its meaning is not clear. Two franchises being referred to, it concludes with the declaration that "such franchise" may be levied upon and sold. Grammatically this expression may refer to either franchise. Its meaning could have been made plain by using the expression "such other franchise" or "such franchise to exist," or "all such franchises" may be levied upon and sold under execution. Probably the intention was that such other franchises could be so sold, for as the section formerly stood it provided that for the satisfaction of a judgment against a person or corporation having a franchise for a toll road the franchise might be levied upon and sold under execution.

That it is the "other franchises" which were to be sold is indicated by section 391 which provides that the "corporation whose franchise is sold" retains the same powers and is bound to discharge the same duties in all other respects as before the sale. Section 361a probably provides for the corporation voluntarily selling even its franchise (to exist), and section 473 provides that railroad corporations may consolidate and that upon such consolidation the constituent corporations cease to exist; but this is not true of the consolidation of mining corporations (sec. 587a), so far at least as liabilities, and suing and being sued are concerned.[19] Section 688 of the Code of Civil Procedure has existed substantially in its present form since 1872,

[18] Southern Pacific Co. v. Hyatt, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; but see Fresno etc. R. Co. v. Southern Pacific R. Co., 135 Cal. 202, 67 Pac. 773.

[19] See Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 Pac. 319, for a discussion of these curious results.

and does not cover sales of franchises on execution, and was not referred to in any of the decisions cited.

If the meaning is that it is such semi-public franchises which may be sold, then there is no statute by which the franchise to exist can be sold on execution, and this could not be done at common law.[20]

Such enabling statutes are found in many states, for a considerable part of the value of the property of a corporation is dependent upon the corporation being a going concern upon the use of the franchise in connection with the property. Separated from its use in this manner, indeed, the value of the property may be slight.

A lease of only a part of the property does not come within the restrictions contained in this section.[21]

PURCHASER TO CONDUCT BUSINESS OF CORPORATION, ETC.

Sections 389 to 393 of the Civil Code are as follows:

> § 389. The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same, as hereinafter provided. (Enacted March 21, 1872.)
>
> § 390. The purchaser, or his assignee, is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages, or other cause, occurring during the time he holds the same, and may use the name of the corporation for the purpose of any

20 Gregory v. Blanchard, 98 Cal. 311-313, 33 Pac. 199, and other cases cited in the preceding notes to this section.

21 Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 630, 120 Pac. 15.

action necessary to recover the same. A recovery for damages or any penalties thus had is a bar to any subsequent action by or on behalf of the corporation for the same. (Enacted March 21, 1872.)

§ 391. The person, company, or corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures, as before such sale. (Amended March 20, 1905; Stats. 1905, p. 409.)[22]

§ 392. Redemption from any such sale may be had as provided in the Code of Civil Procedure in the case of redemptions from sales of real estate on execution. (Amended March 20, 1905; Stats. 1905, p. 409.)[23]

§ 393. The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business, or in which the property, or some portion thereof, is situated. (Amended March 20, 1905; Stats. 1905, p. 409.)

There appear to have been no decisions of our appellate courts considering questions arising under the above sections.

MISNOMER

"The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended." (Civil Code, sec. 357.)

It was held before the passage of the above statute that a promissory note signed "Bradley & Co.," a corporation, would not bind the corporation of Bradley,

22 Section 391. The amendment makes the section applicable to persons and companies as well as to corporations.

23 Section 392. The amendment makes applicable to an execution sale of franchises the law of redemption applicable to other sales of real property. But see Title Ins. and T. Co. v. California Dev. Co., 171 Cal. —, 152 Pac. 555.

Berdan & Co., because the contract was not made by it. But the court said if the latter corporation knew of the deceit practiced, and participated in the fraud by receiving the consideration, recovery could be had on the consideration for which the note was given.[24]

The leading case upon this subject[25] contains probably the full measure of confusion. The name of the corporation was the "Santa Barbara Land, Building and Improvement Company." A note was signed by the above name, excepting the word "Building"; the mortgage securing the same was signed by C. P. Low as president, leaving out the words "Santa Barbara" and "Building," and the acknowledgment left out the word "Building." In the bodies of both the note and mortgage, however, the correct name appears, and the proper seal was attached to each. The court said it could be reasonably ascertained from each instrument what corporation was intended and that the acknowledgment was good for the same reason, and held both the note and mortgage binding obligations on the corporation.

Where a notice of garnishment was addressed to the Donohue-Kelley Company, instead of to the Donohoe-Kelly Banking Company (the proper name), and this notice was served on the proper party, it was held to be good.[26] A publication of a summons to the "Clio Mill and Mining Company," the name of the corporation intended being the "Clio Mining Company," (some special appearances in the case, however, aiding the matter) was also held good.[27] An assessment for taxation of the "Sierra Buttes Quartz Mining Company"

24 Sargent v. Wilson, 5 Cal. 504, 505.

25 Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 314, 28 Pac. 1049.

26 Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 194, 94 Am. St. Rep. 28, 71 Pac. 93.

27 Nisbet v. Clio Mining Co., 2 Cal. App. 436, 83 Pac. 1077.

by the proper name, except the omission of the word "Mining," was held good, especially as the company had appeared before the board of equalization and on complaint secured a reduction of the amount of its assessment.[28]

The foregoing decisions indicate that the courts are disposed to treat mistakes in the names of corporations with a great deal of indulgence, yet each case must stand upon its own special circumstances and, for reasons quite obvious, misnomers are liable to be attended with serious consequences.

[28] People v. Sierra Buttes etc. Min. Co., 39 Cal. 511, 514.

CHAPTER VIII

BY-LAWS, ADOPTING

Section 301 of the Civil Code in regard to the adoption of by-laws reads as follows:

> § 301. Every corporation formed under this title must, within one month after filing Articles of Incorporation, adopt a code of by-laws for its government not inconsistent with the constitution and laws of this state.
>
> The assent of stockholders representing a majority of all the subscribed capital stock, or of a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose;
>
> And in the event of such meeting being called, two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or if none is published therein, then in a paper published in an adjoining county, must be given by order of the acting president.
>
> The written assent of the holders of two-thirds of the stock, or of two-thirds of the members if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose. (Amended March 30, 1874; Amdts. 1873-4, p. 200.)

A by-law has been defined to be a permanent and continuous rule for the government of the corporation and its officers.[1] A resolution, as distinguished from a

1 "By-laws are the body of rules, laid down for the government of a corporation, its officers and stockholders, in the conduct of its affairs." They do not bind a depositor in a bank unless expressly assented to. Wells v. Black, 117 Cal. 157-161, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; Bornstein v. District Grand Lodge etc., 2 Cal. App. 624, 84 Pac. 271.

by-law, usually is confined to a particular matter, and does not require the same formalities, nor usually any notice to the body of the stockholders, for its adoption. In a certain sense, a by-law is the law of the corporation as to its internal management and the conduct of its business, binding upon all members of the corporation, and also upon all persons dealing with the corporation who have knowledge of it, but not otherwise. A by-law must operate upon all members alike; it must not be for the benefit of one stockholder as against others, nor directed against one or more only. In building and loan associations they are held to be a part of the contract between stockholders.[2]

The power to enact by-laws is inherent in every corporation without any statute on the subject. At common law the power to enact by-laws lay in the whole body of the corporation. This rule probably grew out of the original character of corporations when membership, and not the amount of stock held, was the chief characteristic of a stockholder. It is common now for statutes to permit the directors to adopt or amend by-laws; the Civil Code, section 304, provides that the stockholders may delegate this power to the directors.

It is doubtful, under the language of this section, whether by-laws can be adopted at a meeting of the stockholders, where the notice of the meeting did not state that this was to be done. This section provides that by-laws may be adopted by a majority (two-thirds not required) of the subscribed stock "at a meeting called for that purpose." Nothing is said about adopting them at a regular meeting; apparently it must be done at a meeting "called for that purpose." Without serious doubt the notice of the regular meeting might properly contain a notice that by-laws would be adopted

2 Law Credit Co. v. Provident etc. Ass'n, 14 Cal. App. 689, 112 Pac. 906.

at the meeting. Amendments (although not mentioned in this section) would undoubtedly come within its provisions, for adopting amendments to by-laws is adopting by-laws. The language of this section being quite different from section 304 of the Civil Code, consideration of the latter will follow in its regular order.

It has been held that a by-law may be shown, that is, it may really arise by the customs or usages of the corporation and the acquiescence of the members. Like many similar rights, privileges, or rules which have been acquiesced in, it will be presumed (and a by-law may be waived by a contrary course of business)[3] to have been regularly and duly adopted. A revision of the by-laws, called "new by-laws," repeals the old ones, although no words expressing that intention are used.[4]

It is not necessary for a stockholder to sign the by-laws; he is bound by them whether he signs them or not.[5] It was said that, independent of the statute, a corporation may provide by a by-law for voting by proxy; and this on matters which by provision of the statute are to be determined "by a vote of the stockholders."[6] But a provision in a by-law which is contrary to the statute is void; such as entitling a stockholder to return his stock to the company and receive back the money paid by him for it,[7] and one forbidding what the law expressly authorizes,[8] as also is a by-law of a savings bank, not signed by a depositor, relieving the stockholders of their constitutional liability for the

[3] Underhill v. Santa Barbara etc. Co., 93 Cal. 300-311, 28 Pac. 1049.

[4] Murphy v. Pacific Bank, 130 Cal. 542-550, 62 Pac. 1059.

[5] McFadden v. Board of Supervisors of Los Angeles Co., 74 Cal. 571, 574, 16 Pac. 397.

[6] Market St. Ry. Co. v. Hellman, 109 Cal. 571, 597-599, 42 Pac. 225.

[7] Vercoutere v. Golden State etc. Co., 116 Cal. 410, 414, 48 Pac. 375.

[8] Reclamation Dist. v. Hagar, 66 Cal. 54, 56, 4 Pac. 945; Bornstein v. District Grand Lodge etc., 2 Cal. App. 624-628, 84 Pac. 271.

debts due depositors;[9] and likewise, as to creditors, a by-law which provides that no assessments on the capital stock (on which only 30 per cent had been paid) shall be made except by a two-thirds vote of all the stock outstanding.[10]

So also is a by-law void which is retrospective, preventing the transfer of stock until an indebtedness to the company is paid,[11] or one annulling or impairing existing obligations.[12] A by-law can not take away substantial rights of the stockholder, and one which provides that holders of proxies must also be stockholders is void as being an infringement on section 312 of the Civil Code;[13] while section 303 of the same code provides that the by-laws may provide for "the mode of voting by proxy," it does not authorize the curtailing of the right. It has been held that a signature to by-laws before the corporation was formed, in contemplation of its formation, but never formally adopted by the corporation, bound the parties signing, and was an agreement which the corporation could enforce,[14] and where the by-laws of a church (incorporated) were written in its record book by the minister and were always acted on as such, though never formally adopted, they constitute its by-laws.[15]

9 Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090.

10 Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

11 People v. Crockett, 9 Cal. 112.

12 Bornstein v. District Grand Lodge etc., 2 Cal. App. 624, 84 Pac. 271.

13 People's etc. Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452.

14 Vercoutere v. Golden State etc. Co., 116 Cal. 410, 415, 48 Pac. 375; West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

15 Baker v. Ducker, 79 Cal. 365, 372, 21 Pac. 764.

Where a by-law provided that "no mortgage or conveyance shall be made without the consent of the holders of at least two-thirds of the outstanding capital stock," it was held that a *lease* of a part of the property of the corporation made by the directors, without first getting such consent of the stockholders, was valid, on the ground that the word "lease" was not included, in such a case as this, within the meaning of the words "mortgage" or "conveyance."[16]

It has also been said by our own courts that the right to make by-laws is inherent in the corporation, and the purposes named in section 303 of the Civil Code do not limit the authority to make any by-laws on any other proper subject; that in the absence of a restrictive statute the character of the by-law is to be determined by the corporation itself, and that, as to those who sign the by-laws, they are a contract between them and the corporation.[17] A corporation sole has no need of by-laws.[18]

BY-LAWS MAY PROVIDE

Section 303 of the Civil Code is as follows:

> § 303. A corporation may, by its by-laws, where no other provision is specially made, provide for:
>
> 1. The time, place, and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of stockholders or directors;
>
> 2. The number of stockholders or members constituting a quorum;
>
> 3. The mode of voting by proxy;
>
> 4. The qualifications and duties of directors, and also the time of their annual election, and the mode and manner of giving notice thereof;

16 Seal of Gold Min. Co. v. Slater, 161 Cal. 630, 120 Pac. 15.

17 People's etc. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

18 Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 Pac. 830.

5. The compensation and duties of officers;

6. The manner of election and tenure of office of all officers other than the directors; and

7. Suitable penalties for violations of by-laws, not exceeding, in any case, one hundred dollars for any one offense.

8. The newspaper in which all notices of the meetings of stockholders or board of directors, notice of which is required, shall be published, which must be some newspaper published in the county where the principal place of business of the corporation is located, or if none is published therein, then in a newspaper published in an adjoining county; *provided*, that when the by-laws prescribe the newspaper in which said publication shall be made, if from any cause, at the time any publication is desired to be made, the publication of such newspaper shall have ceased, the board of directors may, by an order entered on the records of the corporation, direct the publication to be made in some other newspaper published in the county, or, if none is published therein, then in an adjoining county. (Amended March 19, 1889, Stats. 1889, p. 365.)

In the case cited above, People's etc. Bank v. Sadler, it is said, that the purposes herein enumerated are not exclusive. To hold them exclusive would cause great embarrassments and difficulties in carrying on the affairs of corporations. These provisions are introduced by the words "where no provision is specially made." The section is in some respects superfluous, and in other respects is liable to mislead. Instances of the latter kind are found in the first subdivision in regard to the place of meeting, as to which the corporation has no discretion, for under Civil Code, section 319, all meetings must be held at the office or principal place of business of the corporation; and in the second subdivision providing that the by-laws may fix the number of stockholders constituting a quorum, while section 312 of the Civil Code provides that *not less* than a *majority*

of the *subscribed* capital stock is necessary, although doubtless they might require a greater number; and in the fourth subdivision in regard to the qualification of directors, while the Civil Code, section 305, requires them to be stockholders and a majority of them to be residents of the state. A provision requiring directors to own not less than a certain amount of stock is not uncommon, and its legality could hardly be questioned. In conducting a corporation, with this statute before them, the stockholders and officers naturally think it authority, and are not likely to look through all the volumes of our codes and statutes in search for some variation or limitation. This section should be amended by eliminating its misleading features.

INSPECTORS OF ELECTIONS

When a by-law designates certain officers inspectors of election, giving them certain power therein, it has been said that the inspectors possess the sole right to determine when the polls shall close, and that it was not an abuse of discretion on their part to keep the polls open until noon of the next day. It was also said in this case that propriety dictates that inspectors should not work for the election of any particular candidate, but to do so was not an illegal act and it would not affect the validity of the election.[19] But would inspectors appointed by the meeting only have such remarkable powers?

The *time* of the *meetings* of stockholders may be regulated by the by-laws, with this qualification that they must occur at least once a year in order to elect directors whom the statute requires to be elected annually. This provision that the by-laws may make rules concerning conducting of meetings must be taken with many limitations, for the manner of the election of

[19] Clopton v. Chandler, 27 Cal. App. 595, 150 Pac. 1012.

directors is pointed out in great detail in other sections of the code. The privilege of dispensing with notice of all regular meetings of the stockholders and directors is very wise. All concerned may know these by virtue of the by-laws; nothing has been more prolific of doubt, uncertainty, and controversy than the sufficiency, timeliness, and legality of notices of meetings. These difficulties should be reduced to the least possible minimum. But if, notwithstanding, a notice should be given stating the purposes of the meeting, the power of the meeting would doubtless be confined to those purposes. With the possible exception of the meeting of stockholders to elect directors, if the by-laws dispense with notice, it is better to give no notice whatever of such regular meetings; but, if one should be given, to state no more than that a regular meeting of the stockholders (or directors) will be held at the day and hour and place named (being very careful to fully comply with the statutes and the by-laws in these respects), stating no purpose whatever, except in the notice and in the publication of notice of the meeting to elect directors, and to increase or diminish stock, or bonded indebtedness.

QUORUM OF STOCKHOLDERS

As we have seen, section 312 of the Civil Code declares that the *minimum* number for a quorum is a majority of the *subscribed* stock. Of course, it is within the power of the corporation to require a greater number.

VOTING BY PROXY

This clause expressly recognizes the right of the corporation to establish the mode of voting by proxy. As proxies do not vote in any different manner from stockholders, this clause probably had in view the form of proxies; that they must be in writing, the manner of their execution, filing the same with the secretary, and

the like, as provided for elsewhere. Section 321b of the Civil Code makes some special provisions in regard to execution and length of time a proxy may exist. It has been expressly decided that "the statute gives to the corporation the power to regulate the exercise of the right but no power to qualify or limit the right" as by requiring the holder of the proxy to be a stockholder.[20] Voting by proxy applies to a vote on an increase of capital stock, and an issue of bonds as well as to the election of directors.[21] But if it is in the usual form, not specially giving power to sign the various statutory "consents," it is uncertain whether he could do so.

DIRECTORS, QUALIFICATION, ETC.

The qualification of directors required by section 305 of the Civil Code, of course, can not be dispensed with; the by-laws may require a director to own a certain number of shares[22] (not simply be a stockholder) and add any other requirements seen fit. The duties of directors are found in many sections of the codes and general laws; these can not be waived or diminished by the by-laws, but some of them may be increased. The by-laws may fix the time of the annual election of directors, and possibly the manner of giving notice thereof. And the by-laws themselves may be adopted by a majority of a meeting or by the holders of two-thirds of the stock assenting in writing to their adoption.

20 People's etc. Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 606, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 599, 42 Pac. 225; Brewster v. Hartley, 37 Cal. 15-24, 99 Am. Dec. 237.

21 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 597, 42 Pac. 225.

22 Waterbury v. Temescal Water Co., 11 Cal. App. 632, 637, 105 Pac. 940.

NOTICE OF MEETINGS

Notwithstanding the provision of the first clause of this section, providing that the by-laws may dispense with notice of all regular meetings of stockholders and directors, and the provision of the fourth clause to the effect that the by-laws may provide the mode and manner of giving notice of the annual election of directors, in a later (1909) act of the legislature amending section 302 concerning the annual election of directors the clause was added, "Notice of such election must be given as prescribed in section 301, unless all of the stockholders waive such notice in writing." Section 301 provides only for the adoption of by-laws and the notice of the meeting for that purpose. But that notice is not necessary unless a meeting is "called" for that purpose, and it is not necessary to call a regular meeting if dispensed with by the by-laws under the first clause of section 303. As a result of this amendment the most confusing uncertainty is introduced as to whether publication of notice is necessary in every case irrespective of any provision of the by-laws. Probably the safer course would be to publish the notice (apparently notice by mail, or personal notice would not be sufficient) notwithstanding the well known fact that such publication notices are the most ineffective and worthless form of notice yet devised. Never ending difficulties are encountered in the lack of harmony between the sections of the statutes, and the disposition of the legislature, and sometimes the courts, to intervene at every possible point in matters of even trivial detail adds to the difficulties, and also adds greatly to the necessity for and to the revenue of the lawyers.

But whatever the notice of the meeting for the election of directors, those elected are at least *de facto* directors, all their acts are valid and bind the corporation, and if their election is illegal for want of proper

notice they can be removed only by due process of law through the courts, or by two-thirds of the stockholders under the provisions of section 310 of the Civil Code. The form and manner of the notice of this meeting for the removal of directors and the election of their successors, an unusually important one, it will be observed, may be prescribed by the by-laws.

DE FACTO DIRECTORS

If directors are not stockholders by reason of the fact that the stock which they hold is invalid, and hence are not *de jure* directors, they may be at least *de facto* directors, which is sufficient for probably all purposes, and it was held that they had power to levy an assessment.[28]

OFFICERS, COMPENSATION AND DUTIES

This clause, in the absence of a by-law, could not be held to take away from the directors the usual powers held by them of fixing such compensation and duties, although if the by-laws fixed these matters, the by-laws and not the statute would have that effect. While section 305 of the Civil Code provides that the powers, business, and property of a corporation must be exercised, conducted, and controlled by the directors, yet this must be pursuant to the by-laws, although not so expressly stated in the section. That is a fundamental condition of the conduct of the business of a corporation.

In view of the fact that, in the absence of any previous agreement or resolution fixing a salary or compensation for its directors, who are also officers, they are not entitled to any compensation for services rendered by them as such officers or directors, yet, if the

[28] O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-69, 97 Pac. 1; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

services are onerous and valuable, it was held by a divided court that they were entitled to a *quantum meruit*.[24]

If, according to the customs and usages of the corporation, the directors and officers serve without salaries, all such officers are charged with notice of such customs and usages and can recover no compensation in the absence of an express lawful contract.[25]

When a director employs a person to do what the director should do (employing a watchman to look out for the mine) the corporation can not be charged with the salary of the watchman, there being no express contract by the corporation with the watchman.[26] The

[24] Wickersham v. Crittenden, 93 Cal. 17-32, 28 Pac. 788, s. c. 106 Cal. 327, 39 Pac. 602; Brown v. Valley View etc. Co., 127 Cal. 630-637, 60 Pac. 424; but may be subsequently ratified by a competent board, Wickersham v. Crittenden, 110 Cal. 332, 42 Pac. 893; cited with approval in Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175-183, 56 Pac. 887. That they might be entitled to a quantum meruit was intimated in Graves v. Mono Lake etc. Min. Co., 81 Cal. 302-320, 22 Pac. 665. In the Wickersham case, in 93 Cal. 32, the court says (dictum) that for an unusual service the president would be entitled to a quantum meruit compensation; it was intimated that the resolution could not be ratified by the stockholders. To the same effect as to quantum meruit, Bassett v. Fairchild, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; and payment for outside services to the secretary in addition to his salary, although he is also a director, in the absence of proof to the contrary will be presumed to be fair and proper, Zellerbach v. Allenberg, 99 Cal. 57-70, 33 Pac. 786.

See Strouse v. Sylvester, 6 Cal. Unrep. 798, 66 Pac. 660, for an interesting case of salaries voted to officers by "dummy directors" held to be fraudulent, and invalidating assessments subsequently levied for their payment.

As to waiver of salary by the secretary, and the effect thereof, see Ryan v. Pacific Axle Co., 6 Cal. Unrep. 902, 68 Pac. 498.

[25] Fraylor v. Sonora M. Co., 17 Cal. 594; McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328-338, 43 Pac. 956. See, also, Barstow v. City R. Co., 42 Cal. 465.

[26] Brown v. Valley View M. Co., 127 Cal. 630-637, 60 Pac. 424.

astonishing thing in this decision is the inference that a director should perform such services, and that he is not entitled to be reimbursed his expenditures therefor because "A director in a corporation is not entitled to compensation for his services as a director in the absence of any agreement in advance that he shall receive such compensation."

In regard to compensation to the president for his services in a very early case[27] it was held, in the absence of an express contract, that he was "entitled to recover therefor upon an implied contract to pay what the labor or services are reasonably worth."

A director, who was also vice president and general manager and who rendered onerous and valuable services in the latter capacities, there being no contract or resolution on the subject of his compensation, was held to be entitled to payment of the reasonable value of the services rendered,[28] but this was by a divided court, only one less than a majority joining in a vigorous dissent. That an opposite rule should ever have prevailed is one of the "curiosities of the law," and it was not developed by legislation.

In addition to a salary, the president may be paid a percentage on the profits of the business.[29] This case presents an interesting consideration of the manner of arriving at the amount of net profits.

In regard to compensation of the superintendent, it was said in an early day that a court of equity can not deprive him of his salary because he is also a director, he having faithfully performed his duties and no fraud appearing,[30] and some years thereafter, that if there

27 Rosborough v. Shasta River Canal Co., 22 Cal. 556-562.

28 Bassett v. Fairchild, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082.

29 Horton v. Remillard Brick Co., 170 Cal. 384, 149 Pac. 813.

30 Neall v. Hill, 16 Cal. 145, 146, 76 Am. Dec. 508.

was no special agreement fixing the salary of a superintendent of a railroad company, he was entitled to recover the value of his services.[31] Where the by-laws required the superintendent to be elected and his salary to be fixed by the directors, the manager had no power to appoint him or to fix his salary; if, however, the directors knew of such appointment but did not know the amount of the salary agreed upon and they received and acted upon his reports, they ratified his appointment, and the corporation was responsible for his reasonable compensation.[32]

Nor can the directors vote themselves any salary after their election, nor can they vote the president a salary if his vote is necessary to carry the resolution.[33]

It is usual, and the better practice, to fix the duties of officers by the by-laws; but this can be done only in a general way, and it is well to state that in all other particulars they are subject to the control and direction of the directors, so that they may not consider themselves independent of the directors, claiming that they are controlled only by the higher law of the by-laws.

The meaning of the word officer is vague and very uncertain. In some respects directors are officers; in other respects the term includes only so called officials and not the directors. No general rule can be formulated for determining this question; each case must stand on its own particular circumstances. It might be stated, probably without error, that the incumbent of every position created by law or by-laws is an officer, and most of those created by the board of directors are employees. The president, secretary, and treasurer are provided for by law, though elected or appointed

[31] Bee v. San Francisco etc. R. Co., 46 Cal. 248, 249.

[32] Colpe v. Jubilee M. Co., 2 Cal. App. 393, 84 Pac. 324.

[33] Wickersham v. Crittenden, 93 Cal. 17, 32, 28 Pac. 788, and cases cited hereafter under title of the various officers.

by the directors, and hence would not constitute exceptions to this rule. The office of vice president is not provided for in the statutes, but probably may be created in the by-laws under the fifth subdivision of section 354 of the Civil Code, for all officers, unless it be directors, are clearly "subordinate officers."

Fines or penalties are seldom provided for except in social organizations, boards of trade, etc., which must exercise some authority over the conduct of their members, and in building and loan societies. It is very seldom any such provisions are made in corporations having a capital stock, for the reason that they would be ineffective or inadequate, pecuniary liability for any loss sustained, or removal from office, being the only means of protection at all adequate. Fines imposed upon directors for failure to attend meetings are quite proper, and are within the powers of the corporation, possibly also upon persons for disorderly conduct in a stockholders' meeting, but such power must be provided in the by-laws.

NEWSPAPER FOR PUBLICATIONS

The by-laws may also designate the newspaper (which must be of the character named in this section) in which all publications are to be made. This, like all other provisions of this section, is permissive only, not obligatory.

EXTENT OF BY-LAWS

It has been decided that a water company may, by its by-laws, limit the use of its water to its stockholders, and establish the rates for the same, and that neither the constitution nor the act of 1885, providing that the supervisors may regulate the rates of a public service corporation, are applicable to such a corporation.[84]

[84] McFadden v. Board of Supervisors of Los Angeles Co., 74 Cal. 571, 16 Pac. 397.

This would seem to widen the effect of by-laws to the limit with reference to the power of directors, in view of the statutes and numerous decisions that the business of a corporation must be managed by the directors and that the stockholders can not control or dispense with the action of the directors. On the other hand a by-law creating a lien upon shares of stock owned by any stockholder who is indebted to the corporation is void as against an innocent purchaser of the stock from the debtor stockholder, notwithstanding the statutes limiting the right of transfers of stock referred to.[35]

BY-LAWS, CERTIFICATION, AMENDING, RECORDING, INSPECTION

Section 304 of the Civil Code reads as follows:

> **§ 304.** All by-laws adopted must be certified by a majority of the directors and secretary of the corporation, and copied in a legible hand, in some book kept in the office of the corporation, to be known as the "book of by-laws," and the book must then be open to the inspection of the public during office hours each day except holidays.
>
> The by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting, or at any other meeting of the stockholders or members, called for that purpose by the directors, by a vote representing two thirds of the subscribed stock, or by two thirds of the members.
>
> The written assent of the holders of two thirds of the stock, or two thirds of the members if there is no capital stock, is effectual to repeal or amend any by-law, or to adopt additional by-laws.
>
> The power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, or similar written assent, be delegated to the

[35] Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

board of directors. The power, when delegated, may be revoked by a similar vote, at any regular meeting of the stockholders or members.

Whenever any amendment or new by-law is adopted, it must be copied in the book of by-laws with the original by-laws, and immediately after them.

If any by-law is repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted, or written assent was filed, must be stated in said book.

Until copied or stated as hereinbefore required, no by-law, nor any amendment or repeal thereof, can be enforced against any person, other than the corporation, not having actual notice thereof. (Amended March 21, 1905; Stats. 1905, p. 557.)

Until the amendment of 1905, p. 557, this section provided that no by-law, or amendment thereto, should take effect until copied in the book of by-laws. This provision was found to work so badly that it was repealed, and the last sentence of the above section was enacted, making the by-laws effective against the corporation and all who have actual knowledge of their existence, even if not copied into the book of by-laws. Apparently such a by-law would not bind a stockholder who had no actual notice of its existence; but this must be taken in connection with the decision that stockholders can not avoid responsibility for unauthorized acts by abstaining from inquiry into the affairs of the corporation, or absenting themselves from meetings.[86]

CERTIFICATION

The by-laws must be certified by a majority of the board of directors and the secretary of the corporation. This must be done in all cases, whether they are adopted

[86] Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 312, 28 Pac. 1049; San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 62-64, 33 L. R. A. 788, 44 Pac. 333; Lady Washington etc. Co. v. Wood, 113 Cal. 482, 489, 45 Pac. 809.

at a meeting or by the assent of two-thirds of the stockholders. There is then no question as to what they are, or of notice of their contents to all concerned. The practice, not uncommon, of keeping them, especially amendments, on loose sheets is thoroughly bad, and is liable at any time to give rise to serious questions as to their effect, and to loss of rights by the corporation.

INSPECTION

The book of by-laws must be kept open to the inspection of the public during office hours of every day, except holidays. Making them open to the inspection of the general public, whether interested or not, is a novel provision. No penalty, however, seems to have been provided for failure to do so, except as to stockholders; refusal of any officer or agent of a corporation to give inspection and an opportunity to a stockholder to copy any book, paper, or document of the corporation is a misdemeanor. (Penal Code, section 565, post.)

AMENDING BY-LAWS AS AFFECTING VESTED RIGHTS

It was also held in a class of cases that where the by-laws of the society required all claims to be submitted first to the lodge, with right of appeal to the grand lodge, a member must exhaust all remedies afforded by the society before he can appeal to the courts, and that members of such societies may waive the right to sue in the courts and agree in advance to submit all controversies to arbitration,[87] but, if the society does not give the member notice and an opportunity to produce testimony before making an adverse

[87] Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; Grimbley v. Harrold, 125 Cal. 24, 30, 73 Am. St. Rep. 19, 57 Pac. 558.

decision, a court has jurisdiction to hear and determine the controversy.[38]

Corporations which are societies paying benefits to their members constitute, really, a class by themselves, and rules concerning the interpretation and force and effect of their by-laws differ materially from those governing business corporations.

In the case of a business corporation the courts have said that a by-law is a creation of the stockholders and is generally for their benefit alone, and the same authority which made it may repeal it, and if a course of action contrary to a by-law is acquiesced in by the shareholders, the by-law is thereby waived as to third persons, dealing with the corporation in good faith.[39]

Without doubt a provision in by-laws that they could not be amended would be void, for the statute declares that upon a certain vote they may be amended; corporations are organized with those conditions and any person becoming a stockholder enters the corporation under those conditions.

Some cases have arisen, however, where the by-laws became a part of a contract between the corporation and its members, a pecuniary contract; one in which the member occupies substantially the same position as if he were an outsider dealing with the corporation, still, however, subject to a limited power over him and the contract by the corporation. Such are mutual benefit societies.

In such cases it has been held that the rights to a sick benefit can not be taken away by an amendment to the by-laws for the time elapsed before the amendment is adopted; as to such time it is a vested right. But as to time following the amendment, the rule of the

[38] Schou v. Sotoyome Tribe, 140 Cal. 254, 73 Pac. 996.

[39] Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 311, 28 Pac. 1049.

amendment governs.[40] In the cases cited the by-laws themselves expressly provided that they could be amended at any time, and on the strength of that provision it was held the corporation (society) could amend the by-laws limiting the rights to benefits to six months which theretofore had not been limited; such amendment, however, not cutting off rights to benefits for time already elapsed in excess of the six months.

MANNER OF AMENDING, ETC.

Under this section by-laws may be either repealed, amended, or new ones adopted, and the methods provided are both simple and clear; being so the courts do not appear to have been vexed with difficult, or indeed any, questions on that branch of the section.

MAY BE WAIVED

A by-law which required both the president and secretary to sign all obligations is waived by the corporation acquiescing in the president only signing them.[41]

40 Stohr v. San Francisco Musical Fund Society, 82 Cal. 557, 22 Pac. 1125; Bowie v. Grand Lodge, 99 Cal. 392, 34 Pac. 103; Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 179.

41 Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332-346, 49 Pac. 197; Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 311, 28 Pac. 1049; see Curtin v. Salmon River etc. Co., 141 Cal. 303, 99 Am. St. Rep. 75, 74 Pac. 851.

CHAPTER IX

STOCKHOLDERS' MEETING—ELECTION OF DIRECTORS—CUMULATIVE VOTING.

Article 12, section 12 of the constitution is as follows:

> At all elections for directors or managers every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner, except that members of co-operative societies formed for agricultural, mercantile, and manufacturing purposes may vote on all questions affecting such societies in manner prescribed by law.

This section is not found in the constitution of 1849. Of course, the term "manager" of a corporation has a very clear, definite and certain meaning in the administration of the affairs and business of a corporation, and also in the decisions of the courts, and that meaning is very different from the meaning of the term "director." It can not have been contemplated that such minor officer should be chosen only by the stockholders; the term "manager" was evidently used as a synonym of "director."

Section 307 of the Civil Code is as follows:

> § 307. All elections must be by ballot, and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name, as provided in section 312 of this code, for as many

persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit.

The provisions of this section, so far as it relates to cumulative voting, shall apply to all corporations and associations doing business in this state, having a capital stock or shares of stock, and electing directors by a meeting of stockholders held in this state, whether such corporations or associations are organized under the laws of this state or not; and no election for directors or any corporation or association, doing business in this state, and electing directors in this state, shall be valid, if the right of a stockholder to cumulate his shares as herein provided shall be denied.

In corporations having no capital stock, each member of the corporation may cast as many votes for one director as there are directors to be elected, or may distribute the same among any or all the candidates.

In any case the director receiving the highest number of votes shall be declared elected.

The provisions of this section, so far as it relates to cumulative voting, shall not apply to literary, religious, scientific, social or benevolent societies, having no capital stock or shares, unless it shall be so provided in their by-laws or rules. (Stats. 1903, p. 253.)

MAJORITY

Our supreme court has said that "the rule is that the majority governs, and every stockholder contracts that such shall be the rule,"[1] but did not define of what that majority should consist. This was said on the question of the ratification of a contract, and not as to elections of directors which may be made by the highest

[1] San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53-63, 33 L. R. A. 788, 44 Pac. 333.

vote, not necessarily a majority. A number of other things require, by express statute, the unanimous vote or concurrence of the stockholders; thus is continued, in principle, the ancient rule that each stockholder, without regard to the amount of his holding, has but one vote. Other statutes have declared that certain questions shall be determined by the vote of the holders of the majority, or other proportion, of the shares and to that extent have changed the common law rule; but it is notable that the statutes have not declared that the old rule is changed as to other things. Whether, on other questions, stockholders can vote by shares may be doubted; a *viva voce* vote is decided by members voting, and not by shares held.

ELECTION OR APPOINTMENT, DISTINCTION

Equity had originally no jurisdiction over matters of this kind, but under this section it will administer full relief.[2] The word "election," as used in this connection, means the choice made by the stockholders; a choice made by the remaining directors to fill a vacancy in their own body is an "appointment." In construing the word "election" used in section 315 empowering courts to inquire into, set aside, or confirm "any election held by any corporate body," it is said that the elections referred to were those made by the stockholders only, and that the "corporate body" there referred to is the corporation itself, and not the board of directors, and that an election is a choice in which all who are to be affected with the choice participate, but that an appointment is made by those exercising delegated powers.[3] This decision, however, does not

[2] Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376. This case contains a lengthy discussion of the character of pleadings, parties, and ancillary relief.

[3] Wickersham v. Brittan, 93 Cal. 34, 37-39, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51.

tend greatly to clear from doubt the answer to the question whether the board, in making an appointment to fill a vacancy in their own number, should do so by ballot; the safer course would be to make the selection by ballot.

VOTING BY PROXY is considered elsewhere.[4]

CUMULATIVE VOTING

Cumulative voting was devised to enable a minority, equal in size to that fraction of all the stock voting which one or more directors would bear to the full board, to elect a corresponding fraction of the full board. Its object is to prevent the tyranny of a majority of one share. In business corporations the voting on elections, and on certain questions, being by shares and not by persons (that is, property only votes), the greater property may do as it pleases with the smaller. On the other hand it is equally self-evident that a small interest should not have equal voice in the affairs of the corporation with a large interest, for the larger the interest the larger the risk, and risk is always of greater importance than rates of profit. But that is not sufficient reason why the voice of a minority should not be heard at all—that the larger property may do what it pleases with the property of the minority. The struggle against the adoption of laws securing representation of the minority has been long and intense, and but little headway has been made where capital is massed in the greatest magnitudes, that is east of the Alleghany Mountains.

Cumulative voting has, at length, been secured for the protection of the minority of the property or shares in many of the states either by statute or the constitution, as it is in this state. The usual rule of the amount and distribution of this cumulative vote, and the rule

[4] Under Civil Code, secs. 312 and 321b.

declared in the above section of the code, is that each share have as many votes as there are directors to be elected, and instead of being able to cast only one vote for any particular person, the holder may cast all for one person or distribute the votes, among two, three or any number of persons. A corporation has no power by a by-law to adopt any other method of voting, nor can a stockholders' meeting, by resolution passed by itself, proceed to elect one director at a time, and, in this way, defeat the constitutional and statutory provisions. All the directors to be elected must be voted for at one time, so that a stockholder may vote for all or cumulate his votes as he desires,[5] otherwise the cumulative privilege would be destroyed.

Where five directors are to be elected this rule enables the holders of two-fifths of the shares, by casting all their votes equally for two persons, to elect them directors no matter how the majority may cast its votes.

The majority may so distribute its votes as to enable the minority to elect a majority of the board. If the total shares are 100 and the directors to be elected are five, a majority of 60 shares would have 300 votes and the minority 40 shares, 200 votes. If the majority cast its vote equally for five persons, each would receive 60 votes, and if the minority cast all its votes equally for three persons, each would receive 66 2-3 votes, and the minority would elect three of the five directors. Not only is the majority prevented from completely shutting out a minority of two-fifths (or indeed one-fifth), but if it attempts to do so in the case of two-fifths minority, it may lose control of the board. On the other hand if such a minority undertakes to seize more than its share, it may secure only one director or none at all. If either party casts some of its votes for mem-

[5] Wright v. Central Cal. etc. Co., 67 Cal. 532, 8 Pac. 70.

bers of the other party who are satisfactory to it, the result may be that those whom they most desire may be defeated. Therefore the proper and the only safe rule is for each party to consolidate its vote on those only whom they specially desire and not on a number in excess of the fraction which their stock bears to the total amount of stock.

AS TO FOREIGN CORPORATIONS

The provision making foreign corporations doing business and electing directors in this state subject to the provisions of this section as to cumulative voting, and making void all such elections where a stockholder is denied this privilege, is entirely beyond the power of the legislature to enact or of the courts to enforce. No legislature or court has power to regulate the internal affairs of a foreign corporation doing business in the state. A state may decline to admit a foreign corporation, not engaged in interstate commerce, to do business within the state, but it can do no more. If this provision of this section could be made effective, we might have as many ways of electing directors required of a corporation as there are states in the Union—all different from the provisions of the charter of the corporation and the laws of the state where it is organized. And all other charter provisions might be violated or set aside, also the by-laws, the kinds and duties of officers, and their tenure of office; indeed there would be nothing which it could not change, abolish, or for which it could not substitute something else. If a state admits a corporation, it admits it under the conditions of its existence and powers, and method of operation. In the great number of cases in which the question of interference with the internal affairs of a foreign corporation has been raised not a single one has come to our knowl-

edge which sustained it.[6] Enforcing the rights of an individual against the corporation is quite a different thing, such as enforcing the transfer of shares of stock, compelling inspection of books and papers, or the issue of a certificate of stock in lieu of one which has been lost, and the like, but in such cases the general officers with such power and records must be within the state. This provision was inserted in this section by amendment in 1903, and has not yet been considered by the appellate courts.

CONDUCT OF ELECTIONS

Thus far, there has been only one decision on this subject. In a case where stockholders deposited their ballots without marking, or otherwise designating them as cumulative, they were allowed, before the votes had been canvassed or the result declared, to have their ballots returned and to so mark them.[7]

As to inspectors of elections, see By-Laws.

WHO MAY VOTE. PROXIES, EXECUTION AND LIMITATION

Section 321b of the Civil Code is as follows:

> **§ 321b.** At all meetings of stockholders of corporations organized under the laws of this state, or in the case of corporations having no capital stock, then at all meetings of the members of such corporation, only the stockholders or members actually present shall be entitled to vote on any proposition, including the election of directors and other officers of the corporation, unless proxies from absent or non-attending stockholders or members shall be held by some person or persons pres-

[6] See Thompson on Corporations, sec. 6741 et seq., and the many cases cited; Cook on Corporations.

[7] Zierath etc. Drill Co. v. Croake, 21 Cal. App. 222, 131 Pac. 335. But the essential characteristic of a ballot is that it be secret; how secrecy can be preserved in cumulative voting is not apparent.

ent at such meeting and shall be executed in accordance with the provisions of this section.

Every such proxy must be executed in writing by the member or stockholder himself, or by his duly authorized attorney.

No proxy heretofore given or made shall be valid after the expiration of eleven months from the passage of this act, unless the member or stockholder executing it shall have specified therein the length of time for which such proxy is to continue in force, which must be for some limited period, and in no case to exceed seven years from the date of the execution of such proxy.

No proxy hereafter to be given or made shall be valid after the expiration of eleven months from the date of its execution, unless the member or stockholder executing it shall have specified therein the length of time for which such proxy is to continue in force, which must be for some limited period, and in no case to exceed seven years from the date of the execution of such proxy.

Every proxy shall be revocable at the pleasure of the person executing it;

But a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which such proxies may be executed. Executors, administrators, guardians and trustees may give proxies. (Stats. 1913, p. 230; see, also, Civil Code, sec. 312.)

Attention is called particularly to the provision concerning the limited time during which a proxy may be valid. It is modeled on the law of New York, and is a wise provision and will eliminate many uncertainties and controversies in such matters. It would seem that the provision making proxies revocable would prevent making any effectively irrevocable, and thus prevent the formation of "voting trusts" in that manner. Probably the only way of making a "voting trust" secure

would be to transfer the stock on the books of the corporation to the trustees exercising the voting trust. Even in the absence of such a statute, many courts hold a proxy revocable, notwithstanding it states that it is irrevocable.

A proxy can not appoint a proxy in his own stead; this is on the principle that a delegated power can not be re-delegated. A contrary opinion seems to be quite common. The appointment of a proxy by a proxy may be lawful under this section of the Civil Code, if such appointing proxy is duly authorized as attorney in fact to make such appointment. The proxy executed by the stockholder might be a sufficient power of attorney, if it clearly states that the proxy shall have such power.

The presence of a stockholder in the meeting and his offering to vote is a revocation of any proxy given by him. Where a proxy is given to two or more persons they must all be present and cast the vote, unless it is granted to them, "or either of them," in which case such of them as are present may cast the vote. This section gives to corporations having no capital stock the right to prescribe in its by-laws who may act as proxies, but a corporation with a capital stock can not do this, as shown elsewhere under this subject.

ELECTION TO BE ANNUALLY. WAIVER OF NOTICE BY STOCKHOLDERS

Section 302 of the Civil Code is as follows:

> **§ 302.** The directors of a corporation must be elected annually by the stockholders or members, and if no provision is made in the by-laws for the time of election, the election must be held on the first Tuesday in June. Notice of such election must be given as prescribed in section 301, unless all of the stockholders waive such notice in writing. (Amended February 22, 1909, Stats. 1909, p. 48.)

The effect of this section is to make the tenure of office of the directors one year. An exception should be made as to the directors appointed in the Articles (Civil Code, sec. 290) for the first year. Giving effect to both these sections would reduce the term of the directors appointed in the Articles to the remainder of the year ending with the time appointed in the by-laws for the annual elections, and, if no such time is appointed in the by-laws, until the first Tuesday of June, under this section.

The directors appointed in the Articles for the first year are not perfunctory. They do not hold office merely until the first meeting of stockholders. If a meeting of stockholders adopts by-laws in which they fix the time of annual elections at some future time, they can not elect directors before that time to displace those appointed in the Articles. It has been expressly decided that the directors appointed in the Articles have full power to conduct all the business of the corporation until the annual election, provided in the by-laws.[8] The fact that section 306 of the Civil Code, requiring directors to be elected and by-laws to be adopted at the first meeting, was repealed in 1889 is in harmony with this view of the character and power of the directors named in the Articles; indeed its repeal is not in harmony with any other view.

DIRECTORS HOLDING OVER

No provision is made in the statutes for directors holding over, that is for their term continuing beyond the year for which they are elected, in case of a failure to elect new directors at any annual meeting. It is usual in other states to make such a provision in the by-laws, but such a provision in the by-laws would probably not be legal in this state, in view of the prohibition in the

[8] Middleton v. Arastraville etc. Co., 146 Cal. 219, 222, 79 Pac. 889.

sixth clause of section 303 of the Civil Code which expressly withholds the power of fixing the tenure of office of the directors in the by-laws.

But section 314 of the Civil Code provides, in case of a failure to elect directors at the annual meeting, that the directors may order another meeting of stockholders, which would be an act performed after their term had expired. Many cases have arisen where acts of directors, performed long after their term had expired (no successors having been elected), were considered, and the validity or invalidity of their acts determined without this question arising or being determined. It could be debated whether directors holding over are directors *de jure* or *de facto*. In either case their acts would bind the corporation in favor of third parties; but the distinction might be important in controversies between the corporation and the stockholders.[9]

NOTICE OF MEETING

The notice of the meeting for the election of directors shall be the same as is provided in section 301 of the Civil Code (the same as for meeting adopting by-laws), that is: "two weeks' notice by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or if none is published therein, then in a paper published in an adjoining county, must be given by order of the acting president." If an official newspaper is established by the by-laws, of course, that newspaper must

[9] A case of conflict between directors holding over after a new board had been elected, pursuant to mandamus proceedings, should be read in extenso; it is not practical to state it here, Potomac Oil Co. v. Dye, 14 Cal. App. 674, 113 Pac. 126, 130. The statement that after the new board was so elected the old board ceased to have any power must be confined to matters strictly between stockholders, otherwise it would be subversive of all rules in regard to de facto officers.

be used. The theory of publications in a newspaper of notices of the matters of ordinary corporations is antique, and the most ineffective of any that could be devised, owing to the multiplicity of newspapers; and, considered with reference to the general public, the circulation of each is limited and confined to some special class, political or otherwise. It is a matter of common experience that few stockholders, often none at all, see the publication. The really effectual means of notification is a notice sent through the mail, addressed to each stockholder at the address required to be given by him when his certificate of stock is issued. This form of notice is effective and of substantial value, and should be required by statute (if the matter is not left entirely to the by-laws), and provisions requiring publications should be repealed.

Notice of the hour, as well as of the day and place, of the meeting must be given or otherwise the meeting is not legal, unless all the stockholders are present and consenting to the meeting.[10] In the absence of proof it will be presumed that the requisite notice was given and it has been said that the court may appoint some one to call the meeting.[11]

WAIVER OF NOTICE

The last clause of this section provides that instead of such publication, all the stockholders may waive such notice in writing. Section 317 of the Civil Code provides for waivers of notice of any meeting. The section as to by-laws, 303 of the Civil Code, in the first subdivision says *where no other provision is specially*

10 San Buenaventura etc. Min. Co. v. Vassault, 50 Cal. 534; Thompson v. Williams, 76 Cal. 153, 154, 9 Am. St. Rep. 187, 18 Pac. 153; Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 141 Pac. 399; even if the by-laws name the day but not the hour.

11 Potomac Oil Co. v. Dye, 14 Cal. App. 674, 113 Pac. 126, 130.

made the by-laws may provide for the time, place, and manner of calling and conducting meetings, and may dispense with notice of all regular meetings of stockholders or directors, and, in the fourth subdivision, may provide for the time of the *annual election and the mode and manner of giving notice thereof.* Without going into the grammatical construction of this language, and of the expression in section 302, "notice of such election," as distinguished from notice of the time and place of the meeting for that purpose, or the fact that the meeting provided for in section 301 upon which section 302 is based is a called meeting, that is, a special meeting, although the question is not free from doubt, we believe it is not the intent of the statute that notice of this meeting may be governed by the by-laws. This matter is another one of the numberless instances where there is too much regulation of the internal affairs of corporations, resulting in conflicting statutes, and creating uncertainty as to the manner of conducting corporate affairs, to the confusion of stockholders and the public. We find no decisions construing these several provisions.

ELECTION BY POOLED STOCK AND VOTING TRUSTS

Numberless attempts have been made to define a "voting trust," but none have proved satisfactory, and probably none ever will. When stripped of matters not essential to its existence a voting trust is nothing but a "pooling agreement" covering the matter of casting the votes pertaining to the shares pooled. In most cases where they have been held void they contained additional provisions which were adverse to or a fraud upon the corporation or other stockholders, or were designed for the special benefit of the members of the pool, or to create a monopoly of some business in the markets.

The effort to justly decide these cases is another example of the vain struggle of many courts to disentangle themselves from the numberless rules, maxims and so-called principles, declared in former times when these matters did not exist and were not dreamed of.

Happily, our own supreme court brought a clear vision to the examination of this much debated question. The case presented was free from extraneous matters, such as have been mentioned above. They declared such a contract lawful.[12] With a clarity of reasoning, not always found in cases of this character, they showed that denying this right to stockholders would sweep away the right of a stockholder to be represented by a proxy. Some luminous rays were also cast upon the dogma of "public policy" sometimes declared by courts. The court well said that "public policy" is a term which is to be defined by the lawmaking power, for public policy is "to a great extent a matter of individual opinion, because what one man or judge might think against public policy another might think altogether excellent public policy."

The court says, further, that it is not unlawful for two or more stockholders to agree upon a course of corporate action, and this they may carry out by their personal votes, or through their proxies, and that they may select the same proxy for that purpose, and the proxy may be one person, and adds that in most cases the proxy exercises his individual judgment without direction of the principal. The court quotes with approval from another court: "Each stockholder has the

12 Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 585, 600-608, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. Without comment, pooling contracts were said to be valid in Williams v. Ashurst Oil etc. Co., 144 Cal. 619-624, 78 Pac. 28, and the validity of another appeared to be recognized, but without comment, as the case turned on other points, Cortelyou v. Imperial Land Co., 156 Cal. 373, 104 Pac. 695.

clear right to cast his vote as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion, and it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so." The court also showed that the agreement was not in restraint of trade within the proper meaning of that term, nor any more a separation of the voting power of the stock from its ownership than is the case in the appointment of proxies made every day in the year in every corporation in the land.

That these agreements are indispensably necessary in the beginning of many enterprises or where there are serious disagreements or dissensions among the stockholders, or in gathering together the fragments of broken or dismembered corporations, universal experience has demonstrated.

To meet the pressing necessities in the conduct of corporation business another plan has been devised which escapes some of the objections raised to such proxies. Instead of giving a proxy, the shares are conveyed to a trustee and transferred on the books of the corporation to the trustee. The duration of the trust is limited, usually, to a period of five years. The right of the trustee to vote the stock, by virtue of the statutes and numerous decisions, is unquestioned. Under the trust agreement, the trustee issues certificates to the person from whom he received the stock to the effect that he holds the stock under such trust agreement, deliverable at the end of the trust to the holder of this "trustee's certificate," and that this certificate shall be transferable by written endorsement thereon. This provision removes any restraint on alienation, and these certificates circulate in the markets as freely as the certificates for the shares. There being no proxy, the provision in section 321b of the Civil Code, that

"every proxy shall be revocable at the pleasure of the person executing it," is not applicable.

Sometimes the corporation itself is made the trustee; but there are many serious objections to this course which are obvious. Besides the vote on such stock would probably be lost, for in analogy to the denial of the right of a corporation to vote upon its so-called treasury stock, the courts will undoubtedly hold that a corporation can not vote on stock in itself.

In some jurisdictions, when a pooling agreement is made by giving proxies only, it has been held that the mutual giving of such proxies is not a sufficient consideration to each one so giving the proxies to support the agreements, and that the stockholder can recall his proxy at any time. Others hold that it is. What our own supreme court will say can not, of course, be foretold, but there is reasonable ground for believing that they will hold the consideration good, in harmony with the general principles of the law applicable to every other contract that mutual promises are a good consideration for each other.

If the trust agreement could be attacked on the same ground, which is questionable, that obstacle might be avoided by providing a small consideration, payable annually out of the dividends declared on the stock, if any, to the trustee for the services to be performed by him, thus constituting it a power coupled with an interest, which is irrevocable.

ELECTION, QUORUM, RIGHTS OF STOCKHOLDERS AND PROXIES. ADJOURNMENTS

Section 312 of the Civil Code is as follows:

> § 312. At all elections or votes had for any purpose in corporations formed for profit there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing;

Provided, that in all instances of corporations formed for purposes other than profit the by-laws shall provide the number of members or stockholders that shall constitute a quorum for the transaction of business.

Every person acting therein, in person or by proxy or representative, must be a member thereof or a stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election.

Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent or any stockholders or members, and may be set aside by petition to the superior court of the county where the same is held.

Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election had, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors. (Stats. 1907, p. 596.[18])

QUORUM. MAJORITY

In most states, either by statute or the by-laws, the quorum consists of a majority of the issued shares. By the above section in this state it is made a majority of the subscribed shares. Sufficient reason for this rule is found in the facts that the subscriber is liable not only for the payment of his subscription, but also proportionately for all of the debts of the company. This section does not prevent the by-laws requiring a greater number to constitute a quorum. Corporations not organized for profit may make any number a quorum. What is a quorum has never been defined by our courts. In one case it was said when a majority of shares is spoken of it "usually refers to the subscribed or issued or outstanding shares," a very indefinite statement, and

[18] See Civil Code, sec. 321b.

(dictum), "In adoption of by-laws the assent of the stockholders representing a majority of all the subscribed capital stock is necessary."[14]

The latter clause of section 344 of the Civil Code provides that whenever any portion of the capital stock of a corporation has been purchased by it (on sale to pay an assessment) the majority of the remaining shares constitute a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting.

BY-LAWS MAY GOVERN PROCEEDINGS

(See subject, By-Laws.)

PRESENT IN PERSON OR BY PROXY

Any stockholder present, in person or by proxy, may vote all stock standing in his name on the books ten days before the election. It has been, and sometimes even yet it is contended that the language of this section, "a stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election," excludes a person from voting who has sold his stock, notwithstanding the stock appears on the books of the corporation in his name, on the ground that he is not a stockholder.

WHO IS A STOCKHOLDER

But such a person is in many respects still a stockholder. He is entitled to all dividends which may be declared until the stock is transferred on the books, and not the person who happens to hold or own the stock certificate. All notices required to be given are sent to him. He is liable for all debts contracted by the corporation while his name stands on the books of the corporation as a stockholder, under the decisions

[14] Market St. Ry. Co. v. Hellman, 109 Cal. 571, 588, 42 Pac. 225.

defining the word "stockholder" as it appears in the constitution and the statute declaring that liability, notwithstanding he may have sold the stock. The owner of the stock certificate can not complain of loss of any of his rights, when that loss is caused by reason of his own neglect in having the proper transfer made. The seller of the stock, having delivered the certificate to the purchaser, has no legal process by which he may compel the purchaser to have the proper transfer made, and thus relieve the seller of these liabilities. It is universal practice, and it is also the custom of all stock exchanges, to deliver to the purchaser the stock certificate duly endorsed by the seller; and under the rules of all stock exchanges, as to time of delivery of stock sold through the exchange, the delivery must be made the next day, which makes it impossible in most cases to have a transfer made on the books of the corporation before delivery.

Until 1907 (disregarding the futile attempt to eliminate them in 1905) the words "*bona fide*" stood before the words "stockholder, having stock," etc., and the decisions construing the effect of these words, in this connection, excluded stock from voting which for any reason was not legally or even equitably owned by the person in whose name it stood on the books of the corporation. A trustee to whom stock had been transferred without the knowledge or consent of the real owners was excluded from voting.[15] It was said this trustee was not the proxy or representative of the owner, nor a member, nor a *bona fide* stockholder of the corporation.

It was, however, later held that a party who not only appeared on the books of the company as trustee, but

15 Stewart v. Mahoney etc. Co., 54 Cal. 149, 150; cited and approved in Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 594, 595, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

also was such in fact, could vote the stock,[16] that he was the legal owner of the stock, and this when the section contained the words "*bona fide stockholder.*" In a still later case the court called special attention to the language of the section that the person shall be a "*bona fide* stockholder," not that he shall be a *bona fide* "owner" of the stock, and notwithstanding approving Stewart v. Mahoney, cited above, the statement was made that he could be a *bona fide* stockholder without being the owner of the stock; that he may hold as a trustee, or executor, pledgee, etc. But the court held that where the person in whose name the stock had been registered on the books of the corporation, but who never had any interest in the stock, and was only a dummy for the real owner to enable the latter to escape statutory liabilities, if possible, is not a *bona fide* owner within the meaning of this section and could not vote.[17] In a dissenting opinion Beatty C. J. denied the right of the chairman of the stockholders' meeting to refuse a registered stockholder the right to vote, and asserted that the vote should be received, and, if there was objection to the right, that question should be determined under section 315 in a suit to contest the election. To determine who was a *bona fide* stockholder was often so difficult, and gave rise to so many abuses, that these words were stricken out of the statute in 1907, as we have already said.

The statute of 1853 declared that "no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company, as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer." This language

16 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 589, 42 Pac. 225.

17 Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 594, 595, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

is substantially the same, and almost identical, with a similar provision in section 324 of the Civil Code. The court, in construing the act of 1853, said that "a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of election. . . . Until he secures a transfer on the books of the company he is not a stockholder and has no claim to act as such."[18] The majority of the votes cast were by the person in whose name they stood on the books of the corporation, although he had previously sold them, and the validity of the election was sustained.

Both features of this question as to the right to vote were decided in a case involving a statute concerning mining corporations which provided that the *bona fide* owners of stock, as shown by the books of the corporation, were entitled to vote unless the certificate of stock, duly endorsed, be produced at the election, in which case the certificate should be deemed the highest evidence of ownership, and the holder thereof should be entitled to cast the vote. The court held that this was a special law and therefore unconstitutional, and that the right to vote stock in mining corporations was governed, not by this statute, but by section 312 of the Civil Code, and the election of a director by the votes of the person holding the endorsed certificates was held to be invalid,

18 People v. Robinson, 64 Cal. 373-375, 1 Pac. 156; distinguished on "bona fide" requirement in section 312, Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 594, 595, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. The provision of the statute that the ownership of the stock should be "bona fide" was repealed by the amendment of this section of the code in 1907.

and the judgment of the lower court declaring such election valid and unseating the director elected by the vote of the proxies given by those in whose names these shares stood on the books of the company, was reversed.[19] The rule laid down in this case is further strengthened by the elimination of the words "*bona fide*" from the statute since that decision was made.

A very singular decision was made in a case where brokers bought stocks on a regular stock exchange for their customers, the customers putting up margins only on the purchase, and the certificates for the stocks being issued to trustees of the brokers as security for the advances made by the brokers on the purchases. The court said that the stocks were the property of the brokers, as the margin contracts between the brokers and their customers were void under the constitution (as it then existed) and that the brokers could lawfully vote the stocks, but, nevertheless, they were bound to vote them in the interest of those for whom they purchased the stocks,[20] and that the brokers' contract was a pledge. But it will be observed that this decision is opposed to the general rule and the decisions of this state that where the stock is transferred on the books of the company to a trustee, or to any person whomsoever, the latter, as between the corporation and its stockholders, is the owner of the stock, and the only person (in the absence of a proxy) entitled to vote it. No reference is made to any of these decisions. Nor is any reference made to the expression then in the statute of "*bona fide* stockholders." The case has never been cited or followed on this point, and, if it should be, demoralization would result.

The exercise of the right of voting being regulated by statute, the by-laws can not either give or take it

19 Krause v. Durbrow, 127 Cal. 681, 60 Pac. 438.

20 Fox v. Hale & Norcross etc. Co., 108 Cal. 369-385, 41 Pac. 308.

away,[21] nor can the by-laws require a proxy to be a stockholder.[22]

FILING PROXIES

Every proxy, to be effective, must be filed with the corporation, and it is usual to provide in the by-laws that proxies shall be filed a certain number of days before the meeting, so that the corporation may have an opportunity to verify their genuineness, and to give stockholders an opportunity to confer with them concerning the affairs and management of the corporation.

PROXIES ARE REVOCABLE

All proxies are revocable and the latest proxy revokes all previous proxies, whether so expressed or not. Under section 321b of the Civil Code proxies can not continue longer than eleven months from their date, unless a longer time is expressly fixed, and then not longer than seven years. A proxy can not be created by a will, and the death of the owner of the stock extinguishes the proxy.

VIVA VOCE VOTING

On a *viva voce* vote a reasonable rule is that the proxy counts as only one, and not one for each of the persons for whom he is a proxy, for such voting disregards the stock held or represented by any person, and for consultation and judgment the proxy is only one

21 Brewster v. Hartley, 37 Cal. 15-24, 99 Am. Dec. 237.

22 People's etc. Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 606, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 599, 42 Pac. 225.

person. In England, by statute, a proxy can not vote on a *viva voce* vote.

PROXY LIMITED

A proxy can not appoint a proxy, unless specially empowered to do so.

A proxy limited to a special purpose can not be voted on for any other purpose. Voting trusts have been already considered.

PLEDGOR OR PLEDGEE VOTING

A case arose where the pledgor voted stock which he had pledged for borrowed money and his vote decided the election. The court, sustaining the validity of the vote, said the pledgee did not claim the right to vote the shares. But it also said no proxy was given to the pledgee, and that the court could not compel the giving of a proxy (in accordance with the equities of special transactions between the parties), and it is fairly to be inferred that the stock was not transferred on the books of the company.[28] As a result of the statutes concerning the necessity of a stockholder standing on the books of the company as such, unless he gives the pledgee a proxy, the pledgor only can vote the stock. By amendment of Civil Code, section 313, unless otherwise agreed, the pledgor or beneficiary of a trust has a preferred right to vote the stock, but if he fails to do so the pledgee or trustee may vote it. (Stats. 1911, p. 318, see below.)

28 Dulin v. Pacific etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207; but where stock belonging to the corporation, often called treasury stock, is issued to a party lending money to the corporation, or to a third party as trustee or pledgee, to secure the loan, those shares can not be voted by any person, Brewster v. Hartley, 37 Cal. 15, 27-31, 99 Am. Dec. 237.

REPRESENTATION OF PLEDGEE, TRUSTEE, MINOR, INSANE OR DECEASED STOCKHOLDERS

Section 313 of the Civil Code is as follows:

> § 313. The shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator, and, except when otherwise agreed, all shares of stock standing on the books of a corporation in the name of any person as pledgee or trustee may be represented or voted by such pledgee or trustee only when such pledgor or beneficial owner fails to represent and vote the same. (As amended, Stats. 1911, p. 318.)

In order for an executor to vote the shares of the deceased person it is not necessary that the shares be transferred on the books of the company to the executor.[24] And the same rule applies to a surviving partner.[25] All of the above section following the word "administrator" was added by the amendment of 1911. See also Civil Code, section 312, and comments, and Civil Code, section 321a.

ADJOURNMENTS

The provision in the last sentence of section 312 for adjournments of stockholders' meetings if a quorum be not present, or if the election be not had, is clear, and is in the usual form of statutes on that subject. No difficulty, uncertainty or confusion would result if it were not for the provisions of the next section but one, section 314, which reads as follows:

24 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 590, 42 Pac. 225. Without reference to this case, this doctrine is intimated in a dictum in Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 590, 591, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582.

25 People v. Hill, 16 Cal. 113.

> **§ 314.** If from any cause an election does not take place on the day appointed by law or the by-laws, or otherwise, it may be held on any day thereafter as is provided for in such by-laws, or to which such election may be adjourned or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered by the directors, a meeting may be called by the stockholders as provided in section 310. (Stats. 1905, p. 559.)

So far as adjournments are concerned sections 312 and 314 are irreconcilable and destructive of each other. The English of section 314 is very bad; both the intent and method are obscure. A case, just decided, says that under this section the stockholders may call a special meeting for the election, following the provisions of section 310; it is also said that no meeting of stockholders at times other than those appointed in the statutes or by-laws for the election of directors, in the absence of a notice specifying that such election is one of the purposes of the meeting, has the power to elect directors. This is going far when it is remembered that stockholders can bind the corporation in no ordinary business matter, and meet only to elect directors, and sometimes to consent to certain matters specially named in the statutes.[25a]

ONE CORPORATION VOTING STOCK IN ANOTHER

Our statutes do not say how, that is by whom, such stock may be voted. One corporation can not be present at the meeting of the stockholders of another; nor can its board of directors. A director can exercise no authority except in a meeting of the board. Nor can the president or other officer represent the corporation in such a matter, for the voting of stock of a corporation can be regulated only by the by-laws of

[25a] Dolbear v. Wilkinson, 172 Cal. —, 156 Pac. 488.

the corporation issuing the stock and by the statutes. The statutes declare that voting can be done only in person or by proxy. A proxy can be issued only by the corporation owning the stock, that is by its board of directors, and that, of course, must be by act of the board, by a resolution. The corporation issuing the stock is not bound by any by-laws or course of business of the stock-owning corporation in regard to the control or management of the business or affairs of the latter; it looks only to the laws and its own by-laws.

The only case in this state in which this question arose was where the voting corporation, by resolution duly passed, authorized its secretary to vote the stock owned by it in the other corporation, and without comment the vote cast by the secretary was held to be legal.[26] A case decided by the United States supreme court has been cited to the effect that the proper officers of a municipal corporation have the right to vote the stock owned by it in a railroad company, but an examination of the case shows that the statute appointed them for that purpose.[27]

It is interesting to note, in this connection, that any vote or election had otherwise than in accordance with the provisions of article 2 of chapter 1 of title 1 (sections 301 to 321b) of the Civil Code, is, by section 312, voidable at the instance of any stockholder on petition to the superior court. Such votes or elections are not declared void, but simply voidable. That article includes the adoption of by-laws, election of directors and officers, voting by proxy, requiring stock to be registered before voting, votes on change of place of business, and other important matters, and naturally

[26] Market St. Ry. Co. v. Hellman, 109 Cal. 571, 599, 42 Pac. 225.

[27] Hancock v. Louisville etc. Ry. Co., 145 U. S. 409, 36 L. Ed. 755, 12 Sup. Ct. 969; also that several trustees owning stock may appoint one of their number their proxy.

votes had at meetings not called in the manner required by the article. The terms "any vote" and "or election" are not synonyms, and votes on many different matters, as well as at certain elections, are provided for in this article. This provision would seem to have the effect of making all such erroneous proceedings valid, if not assailed in the manner provided. No case has arisen where the effect of this provision has been considered or declared.

TREASURY STOCK CAN NOT VOTE

By the term "treasury stock," as here used, is meant the stock of the corporation not issued or subscribed for, or, if once issued, given back to the corporation, or to some one for its benefit. No stock of this character can vote at any election, or act for any purpose. This is the law universally and there is no exception to it. Apparently the only case coming before our courts on this question was many years ago, where the corporation had pledged some of its unissued stock for borrowed money, issuing it to a trustee for that purpose. The court said this stock, so far as voting powers were concerned, did not come within the rule of a pledge by a stockholder of stock owned by him, and held that such stock really belonged to the corporation and could not be voted upon. The court says this doctrine must command the assent of every one, for a corporation can not become a stockholder in itself, receive dividends from itself, and respond to calls upon assessments, and be responsible to itself for debts owing by itself.[28] Unissued stock has no existence whatever; and while a corporation may pledge a portion, or all, of its author-

[28] Brewster v. Hartley, 37 Cal. 15, 27, 28, 99 Am. Dec. 237; but a pledge of bonds would be legal, Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 344, 49 Pac. 197, and for a like reason a pledge of stock for the purpose of raising money should be legal.

ized but unsubscribed capital stock for borrowed money, such stock does not come into existence for any purpose whatever, except for the purposes of the pledge, until title passes in proceedings to enforce the pledge, or it is otherwise legally parted with. The decisions to this effect in other states are numerous.

STOCKHOLDERS' MEETINGS BY CONSENT OR WAIVER OF NOTICE

Section 317 of the Civil Code is as follows:

> § 317. When all the stockholders or members of a corporation are present at any meeting however called or notified, and sign a written consent thereto on the records of such meeting, or if those not present sign in writing a waiver of notice of such meeting, which waiver is presented and made a part of the records of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed. (Amended February 22, 1909; Stats. 1909, p. 49.)

The first provision of this section seems to require, even if all the stockholders are present at the meeting, the seeming absurdity that they also sign a consent to the holding of the meeting; being present, all the purposes of a previous proper notice are fulfilled. A record showing that all were present is quite proper, but that serves all reasonable purposes. In the case of absentees, a consent to the holding of the meeting would be much better form to prescribe than waiving notice.

Section 302 contains a somewhat different provision as to waiver of notice. It requires the waiver to be signed by all the stockholders, and makes no express provision for the legality of a meeting when the waiver of notice is signed by only those who are absent, but it

applies only to the annual meeting (election), while section 317 applies to any meeting. As the provisions were incorporated into each of these sections by amendment on the same day, it seems to be another instance of loose, inharmonious legislation. It is a fundamental principle that those who were present at a meeting can not object to the notice of the meeting, so far as they themselves are concerned, and should not be required to themselves waive notice. It is doubtless true they are entitled to demand that all others be notified, that the corporation may have the benefit of their advice and votes, but those present can not demand more. A waiver of notice is really an acknowledgment of notice.

POWERS OF SUCH MEETINGS

Section 318 of the Civil Code is as follows:

> § 318. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation. (Enacted March 21, 1872.)

The powers of such a meeting are the same as of a regular meeting so far as general business is concerned, and it may elect officers to fill vacancies which would include all officers except the president, secretary and treasurer who must be elected by the directors (sec. 308), and directors to fill vacancies, who must be appointed by the board unless the by-laws otherwise provide, if the last clause of section 305 should be held to set aside this provision in this section.

FINANCIAL STATEMENT FOR ANNUAL MEETING

The legislature of 1915 enacted a very important law on this subject.

Section 302a of the Civil Code is as follows:

§ 302a. Upon the written request of not less than 10 per cent of the stockholders, presented not less than two weeks prior to the time of the election provided for by section 302 of this code, there must be served upon each stockholder, at least one week prior to such election, one copy of a financial statement of the affairs of the corporation, which must show the authorized capital stock of the corporation, the amount of capital stock subscribed, the amount of capital actually paid in, the assets and the surplus and undivided profits of the corporation, the amount paid to employees, the names and addresses of all the officers and directors of the corporation, the amount of mortgages, bonded or other indebtedness of the corporation and the amount of the last annual, semi-annual or quarterly dividend, and a general summary of the business transacted by the corporation since the last preceding annual meeting.

The financial statement herein referred to shall be signed by the president and secretary of the corporation and shall be sworn to by such officers before some officer authorized by law to administer oaths, and must be personally served upon each stockholder or, in lieu of personal service, must be sent by mail addressed to each stockholder at his place of residence if known, or, if not known, at the place where the principal office of the corporation is situated.

The president or secretary of any corporation who with intent to deceive shall sign a false financial statement shall be deemed guilty of a misdemeanor. (Stats. 1915, p. 1271.)

See also the provisions of section 316 of the Civil Code, and of section 564 of the Penal Code, and various other statutes under the subject of Directors—Liability for False Reports, etc. The decisions hold the directors to the greatest exactness in these reports, and liable, both civilly and criminally, for errors therein; espe-

cially do they go to great lengths in the de Fremery and Youtz cases, there cited.

MEETINGS, WHERE HELD

Section 319 of the Civil Code is as follows:

> § 319. The meetings of the stockholders and board of directors of a corporation must be held at its office or principal place of business.

As to what is the office or principal place of business see the citations and comments under Articles of Incorporation, third subdivision.[29] This requirement affects only domestic corporations; it is not within the power of a state to regulate the internal affairs of a foreign corporation.

A very late case apparently draws a distinction between the "office" and the "principal place of business," saying that the latter expression "apparently is not used in a sense synonymous with that of 'office.'" The notice designated the office as the place of meeting, and the court says, "doubtless, therefore, the board was required to convene at such office." Another objection arose; on the board attempting to hold their meeting they found the door of the room locked, and they were unable to obtain admission; thereupon they convened in the hall, outside the door. The court held the meeting to be legal.[30]

JUSTICE OF PEACE MAY ORDER MEETING

Section 311 of the Civil Code is as follows:

> § 311. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any justice of the peace of the county where

[29] Harris v. McGregor, 29 Cal. 124, 127, 129, and Creditors v. Consumers' etc. Co., 98 Cal. 318, 33 Pac. 196.

[30] Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 120 Pac. 15.

such corporation is established may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the justice may, in the same warrant, direct such person to preside at such meeting until a clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat. The application of a number of stockholders less than three, but holding a majority of the capital stock, has the same effect as an application by three or more stockholders or members. (Amended March 21, 1905; Stats. 1905, p. 559.)

No case has yet been decided by our appellate courts under this section, but a novel case has been decided as to calling elections of foreign corporations doing business in this state which will be quoted quite fully under section 315 of the Civil Code.

ELECTION DISPUTES DECIDED BY SUPERIOR COURT

Section 315 of the Civil Code is as follows:

§ 315. Upon the application of any person or body corporate aggrieved by any election held by any corporate body, the superior court of the county in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice.

Upon filing the petition, and before any further proceedings are had under this section, five days' notice of the hearing must be given, under the direction of the court or the judge thereof, to the adverse party, or those to be affected thereby. (Amended March 21, 1905; Stats. 1905, p. 560.)

As equity was declared to have no jurisdiction to give relief in such cases, except sometimes incidentally as affecting other questions, and proceedings at law by *quo warranto* were attended with so much delay, statutes of this character have been adopted in most states. The statutory proceeding is expeditious and efficient.[31] It can not be brought to remove agents and ministerial officers of the corporation, but only to remove those who by law are entrusted with the management of the corporation, and then only by virtue of a statute, for equity has no jurisdiction in such matters.[32]

This "is a special proceeding provided by statute not according to the common law; and to invest such court with jurisdiction, the requisites of the act must be complied with, and it must so appear on the face of the record. If not so complied with, the court has no jurisdiction to proceed,"[33] and it may be brought by the corporation itself.

The right of a stockholder to maintain such a proceeding does not depend upon his right to vote at the meeting, as where his stock has not been transferred to him on the books of the corporation ten days before the election, nor (under Civil Code, sec. 312) whether he was present or absent at the meeting when the election was had.[34]

This section gives the right to maintain such an action to any person or body corporate who may be "aggrieved" by an election. While this would seem to widen the class of those who might institute such suits, in view of the language of section 312, we think it really limits it. It is universally held in other states

31 Whitehead v. Sweet, 126 Cal. 67, 72, 58 Pac. 376.

32 Neall v. Hill, 16 Cal. 145, 149, 76 Am. Dec. 508.

33 Chollar Mining Co. v. Wilson, 66 Cal. 374-376, 5 Pac. 670.

34 Wright v. Central Cal. etc. Co., 67 Cal. 532, 8 Pac. 70.

that creditors, or persons dealing with the corporation, have no interest in the question of who shall be its directors or officers, and that such statutory remedies are limited exclusively to stockholders (as in section 312). And it is also held, in those states, that "Any person aggrieved does not mean any person whomsoever who may choose to make complaint," and that even a stockholder, who was not a stockholder at the time of the election, or a stockholder present at the election who does not raise his objections there, could not maintain such a suit; but it was held in one case that where the attending stockholder was in ignorance of some fact making the election invalid he could afterwards raise the objection, because in such a case there could not be any consent, consent actual or implied being the foundation of the rule of exclusion.[85] It must be shown that the election was invalid, or that receiving or rejecting certain votes changed the result, or that, in some manner, the complaining stockholder has been injured, which injury can be remedied by the relief afforded by this action. Our own appellate courts have never defined what is meant, or rather who are included or excluded, by the word "aggrieved."

Ordinarily the corporation itself can not make such a complaint, but the statute above authorizes it to do so, and the supreme court, in Chollar M. Co. v. Wilson, cited *supra,* affirms this right.

Where the complaint alleges that the corporation is under the control of the alleged illegally elected directors, it need not allege a demand upon the corporation to bring the suit and its refusal to do so, nor need it allege a demand upon other persons who it claims are the *de jure* directors, they not being in control of the corporation, and stockholders whose stock has been sold under an assessment made by the alleged illegal

[85] See Thompson on Corporations, secs. 933 et seq.

board to carry into effect an illegal contract may maintain the action.[36]

An appeal lies from such a judgment, and all proceedings are stayed upon the execution of the ordinary appeal bond.[37]

It is held that this right is applicable only to elections provided for by statute to be made by stockholders, and not to an appointment of a director made by the board to fill a vacancy, and that the term "corporate body," as used in this section, is the corporation itself, and not the board of directors,[38] and has no application to the remaining members of the board excluding a member elected to fill a vacancy.

An agreement that a party shall be elected president of the corporation can not be enforced; the courts can not control the votes of directors in such a matter; unless a stockholder gives a proxy for a valuable consideration, he may vote the stock as he pleases, irrespective of any agreement or understanding as to who shall be president; and, in the absence of an interest being coupled with the power, or of a lawful valuable consideration, the court will not compel the giving of a proxy nor set aside an election of any director elected by such vote,[39] and the pledgor may vote it.

EFFECT OF APPEAL

The stay of proceedings consequent on an appeal is limited to the enforcement of the judgment itself; it does not destroy or impair its character. It leaves the parties in the same situation with reference to the rights involved in the action as they were prior to the

[36] Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[37] Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58.

[38] Wickersham v. Brittan, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51; Wickersham v. Murphy, 93 Cal. 41, 28 Pac. 793.

[39] Dulin v. Pacific etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

rendition of the judgment. It can not perform the functions of an injunction. The board may recognize a person as a director, and admit him to its counsels, the same as if the judgment had never been rendered.[40] But if the judgment includes an injunction, the appeal will stay proceedings to enforce the injunction,[41] the case of an officer of a corporation being different from that of a public officer under section 949 of the Code of Civil Procedure.

In the case last cited one Smith was declared elected a director and the judgment contained an injunction on the board recognizing his opponent and commanding the board to admit Smith. The effect of the appeal was to suspend the injunction.

See cases and comments on removals by the corporation itself, that is by its stockholders, Civil Code, section 310.

Where a person, who held less than the number of shares to qualify him under the by-laws to be a director, received sufficient votes to elect him a director, it was held[42] that he was not entitled to the office, but the person receiving a less number, if otherwise sufficient. It was also said that the effect of a by-law providing that the "directors shall serve for one year from the date of their election" made the term begin at the moment of the election, and that he could not qualify himself by purchasing the balance of the required number of shares the next day and before the board organized and elected officers, because he was not eligible when the term began. It was also said that it was not material whether a mutual water company was a

40 Dulin v. Pacific etc. Co., 98 Cal. 304, 33 Pac. 123.

41 Foster v. Superior Court, 115 Cal. 279, 282, 47 Pac. 58; cited with approval in another kind of case, Mark v. Superior Court, 129 Cal. 1-6, 61 Pac. 436.

42 Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940. See Rozecrans G. M. Co. v. Morey, 111 Cal. 116, 43 Pac. 585.

corporation organized for profit, for section 303 of the Civil Code gave it power to determine the qualifications of directors irrespective of that fact. It will be observed that the by-law did not fix the beginning of the term, but its ending. The old board holds over, indefinitely, until the new directors accept and take their seats; if they do not accept, their term can hardly be said to have ever begun.

MANDAMUS

It may be said, generally, that the title to an office will not be determined in mandamus proceedings, *quo warranto* being the proper proceeding. Mandamus is resorted to for the purpose of compelling an officer to perform a plain duty, and it may issue against corporations to compel them to perform public duties.

In the case[43] of a foreign corporation, which had its principal office in this state and did all its business here, a former secretary refusing to give up the books, records and papers of the corporation to the newly elected secretary, the district court of appeals held that mandamus was a proper proceeding to compel him to do so. The court said there was no other plain, speedy and adequate remedy in the ordinary course of the law, and that the courts of the foreign state were powerless, as the former secretary was a resident of this state, and intimated that the writ of *quo warranto* was used in this state only to try title to a public office. This case appears to be the first, and as yet the only one, where the question of the proper remedy has arisen.

On a second appeal of this case[44] it was held that a mandamus of the Arizona court (where the corporation was organized) running against the corporation alone (no officers residing in that territory) commanding it

[43] Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 Pac. 677.

[44] Id., 14 Cal. App. 674, 113 Pac. 126, 130.

to call and hold a stockholders' meeting for the election of directors, service being had only upon the "resident agent" of the corporation in Arizona, was legal and effective, and upon its failure to do so that court could appoint a commissioner to call the election, and a new board being elected at such meeting the old board could not thereafter accept the resignation of the old secretary and appoint another in his place. But the old board were holding on, and apparently in possession of everything, and were at least a *de facto* board. The court said that such appointee was not even a *de facto* secretary although he had possession of all the records and papers usually kept by the secretary, and to sustain that conclusion said that a *de facto* officer must hold under color of right, a doctrine which completely destroys the theory and character of a *de facto* officer. The court also held that the courts of this state obtained jurisdiction over all the records and papers in the hands of the old secretary, as well as over him, when its mandate commanding him to turn them over to another person was served upon him. If these cases are held to be authority for more than an aid to the power of the court of the domicile of the corporation in such matters, the courts will come into conflict with each other in frequent cases. On the question of mandamus being the proper remedy in this case, a dissenting opinion was filed by Beatty C. J. on the denial of a rehearing by the supreme court.

The power of the courts of this state to issue the writ of mandamus against foreign corporations and their officers, they and their business and property being in this state, to perform their duties, seems now to be pretty well settled. Again it has been held that mandamus will lie at the instance of stockholders to compel the directors (they having the power under the by-laws) to call an annual meeting of the stockholders.[45]

[45] Stabler v. El Dora Oil Co., 27 Cal. App. 516, 150 Pac. 643.

CHAPTER X

DIRECTORS—POWERS EXCLUSIVE

Section 305 of the Civil Code is as follows:

§ 305. The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted, and controlled by a board of not less than three directors, to be elected from among the holders of stock; or where there is no capital stock, then from the members of such corporations;

Except that corporations formed or to be formed for the purpose of erecting and managing halls and buildings for the meetings and accommodation of several lodges or societies of any benevolent or charitable order or organization, and in connection therewith, the leasing of stores and offices in such building or buildings for other purposes, the corporate powers, business, and property thereof may be conducted, exercised, and controlled by a board [of] not less than three [n]or more than fifty directors, to be chosen from among the stockholders of such corporation or from among the members of such order or organization.

A majority of the directors must be in all cases residents of this state.

Directors of corporations for profit must be holders of stock therein to an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof.

Unless a quorum is present and acting no business performed or act done is valid as against the corporation.

Whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board. (Amended March 20, 1905, Stats. 1905, p. 503.)

The doctrine that a corporation can act only through its board of directors,[1] that they are the original source of all power, has been very rigidly adhered to in this state. The cases have gone to the extent of declaring that the stockholders are not estopped by any act of their own. Nor can they ratify any act of the board which they could not themselves do. This rule is subject to two or three exceptions where the statute specially requires their consent, such as selling all the property, business, and franchises, or mortgaging the property of the corporation, etc. In an early case, which has been consistently followed to this day, it was said "the corporation could only act, could only speak, through the medium prescribed by law, and that is its board of trustees"; that the stockholders have no power to authorize the sale of any of its property, that power being in the directors only,[2] although the consent of the stockholders might be necessary.

In singular apparent contradiction to this rule appear several cases which seem to recognize the power of a single stockholder, if he owns all the stock of the corporation, to control the corporation and to bind it by agreements made by him. In the first case[3] the court said, "the corporation must be treated as a separate entity until it was proven that Campbell was the sole

1 They are the dominant body, the mind and soul of the corporate entity, and the motives and intent of the directors are to be imputed to the corporation, Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

2 Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; so as to paying out moneys, In re La Solidarite etc. Ass'n, 68 Cal. 392, 394, 9 Pac. 453; so as to signing a petition for a street improvement, Mulligan v. Smith, 59 Cal. 206, 225; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Bassett v. Fairchild, 132 Cal. 637, 652, 52 L. R. A. 611, 64 Pac. 1082.

3 Relley v. Campbell, 134 Cal. 175, 66 Pac. 220.

owner of the corporate stock." In another case[4] where it was sought to establish the validity of certain transactions on the ground that one of the parties to the same owned all the stock of the corporation the court says, "If we assume that her ownership of all the stock be a material factor, the trouble is that the record does not warrant the conclusion that the stock is so owned," and then proceeds at some length to demonstrate that the party did not own all the stock. It will be observed that both these cases fell short only on the proof of such ownership. But in the next case[5] the ownership appears to have been satisfactorily shown, and the court says that "Relley *v.* Campbell *(supra)* is authority for the statement that where one individual owns all of the stock of a corporation the same is but the corporate double of the owner of the stock, and such proof destroys the separate entity of the corporation" and held the stockholder liable for the contract of the corporation. No authorities from other courts are cited, and the conclusions reached are a little remarkable.

Under a law which required the consent of two-thirds of the stockholders to the sale of mining ground, though that consent be given, a resolution of the board of directors to sell the same is indispensable;[6] the law only superadds a requirement of such assent by the stockholders. A mortgage executed by the officers pursuant to a resolution passed at a preliminary meeting of

[4] Black v. Harrison Home Co., 155 Cal. 121-128, 99 Pac. 494; contra, see Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918, when the party knowing the fact of such ownership accepts the corporation's obligation.

[5] Rutz v. O'Bear, 15 Cal. App. 435, 436, 115 Pac. 67; Deming v. Maas, 18 Cal. App. 330, 337, 123 Pac. 204. See Llewellyn Iron Works v. Albert Kinney Co., 171 Cal. —.

[6] Alta Silver Mining Co. v. Alta Placer Mining Co., 73 Cal. 629, 21 Pac. 373.

stockholders is not valid;[7] it was not fully executed, and such a mortgage could be ratified only in the manner required to confer the original authority, that is, by resolution of the board of directors. While, speaking generally, the distinction between ratification and estoppel *in pais* has not been clearly marked in the decisions, yet in this state, on account of the fact that ratification is governed by statute, there is an important distinction.[8] Section 2310 of the Civil Code requiring the ratification of an act to be by the same authority and in the mode required to confer original authority, in a suit brought by a corporation to recover the balance due upon a contract not authorized by the board of directors the defendant was not estopped by his part performance from pleading an election before such suit was brought to rescind the contract. As the corporation could have elected not to be bound, the same privilege must be accorded to the other party.[9]

It will be presumed that a corporation's Articles provide for the required number of directors, in the absence of contrary evidence.[10]

7 Blood v. La Serena etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; cited with approval in Pacific Bank v. Stone, 121 Cal. 202, 206, 53 Pac. 634.

8 Ibid, and Curtin v. Salmon River etc. Co., 141 Cal. 308, 312, 99 Am. St. Rep. 75, 74 Pac. 851, and cases cited in these cases. Ratification by the board of "all transactions, payments and agreements" theretofore made by the officers (the one in question being known to the directors) considered as one element in binding the corporation, Allen v. Central Counties Land Co., 21 Cal. App. 163, 166, 131 Pac. 78.

9 Salfield v. Sutter County etc. Co., 94 Cal. 546, 29 Pac. 1105. It is necessary that the full board act formally in order to ratify a promoter's contract intended to be for the benefit of the corporation, Rideout v. National Homestead Ass'n, 14 Cal. App. 349, 112 Pac. 192; Blair v. Brownstone etc. Co., 168 Cal. 632, 143 Pac. 1022.

10 Barrell v. Lake View Land Co., 122 Cal. 129, 133, 54 Pac. 594.

The directors have no power to ratify a note given by the officers for a debt not owing by the corporation,[11] nor can the stockholders do what the directors can not do,[12] such as selling its property and taking stock in another corporation in payment and distributing the shares received among themselves. And, notwithstanding a corporation will be bound by its general usage and practice with reference to the acts of its agents, a settlement of a defalcation to a bank by the acceptance of a deed of real estate is not an ordinary transaction and the power to do so must be conferred by the board of directors.[13] The directors are the only body which can hire employees (in the absence of a delegation of that power to the president or other person); the stockholders can not do so.[14]

REAL ESTATE CONTRACTS

The authority to sell real estate being required by the statute to be in writing, no one has or can acquire such authority from the corporation except by virtue of a resolution of the board of directors, duly passed and recorded.[15] It was also said that acceptance by the corporation of part of the purchase price of the property was not sufficient part performance to authorize a

11 Hall v. Auburn etc. Co., 27 Cal. 255, 256, 87 Am. Dec. 75; distinguished in case of advances of money to the corporation, Seeley v. San Jose etc. Co., 59 Cal. 22, 24.

12 Vercoutere v. Golden State etc. Co., 116 Cal. 410, 415, 48 Pac. 375; Kohl v. Lilienthal, 81 Cal. 378, 387, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

13 Bank of Healdsburg v. Bailhache, 65 Cal. 327, 331, 332, 4 Pac. 106.

14 Brown v. Valley View etc. Co., 127 Cal. 630, 60 Pac. 424; Bassett v. Fairchild, 132 Cal. 637, 652, 52 L. R. A. 611, 64 Pac. 1082, in dissenting opinion.

15 Salfield v. Sutter County etc. Co., 94 Cal. 546, 29 Pac. 1105; Blood v. La Serena etc. Co., 113 Cal. 221-229, 41 Pac. 1017, 45 Pac. 252, cited in Nason v. Lingle, 143 Cal. 363, 366, 77 Pac. 71.

decree for specific performance of an oral agreement to convey real estate.

OWNING STOCK

A person who owns no stock when he is elected a director never becomes a *de jure* director and, although stock is afterwards given him, if he never accepts the office nor takes part in the proceedings or acts of the directors he never becomes a *de facto* director.[16] An interesting distinction is drawn in this case between a director *de facto* as to third persons and as to the corporation itself. A director who ceases to be a stockholder during his term, but continues to act is a *de facto* director until he is ousted in a direct proceeding for that purpose, and his acts are valid as to third persons,[17] and a director holding over is a *de facto* director.[18] If the by-laws do not fix the amount of stock which qualifies a person to be a director he must, notwithstanding, own some stock.[16]

QUORUM

A quorum of directors must be present, and also acting, otherwise the proceedings of the board will be void.[19] This subject will be further considered under section 308 of the Civil Code, and in the following paragraph.

16 Rozecrans Gold M. Co. v. Morey, 111 Cal. 114, 116, 43 Pac. 595. See, also, Waterbury v. Temescal W. Co., 11 Cal. App. 632, 105 Pac. 940.

17 San Jose Sav. Bank v. Sierra etc. Co., 63 Cal. 179; Robinson v. Blood, 151 Cal. 504, 506, 507, 91 Pac. 258, and even so as to dealing, themselves, with the corporation. See Shively v. Eureka etc. Co., 5 Cal. App. 236-244, 89 Pac. 1073; Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 629, 120 Pac. 15.

18 Kinard v. Ward, 21 Cal. App. 92, 130 Pac. 1194.

19 Curtin v. Salmon River etc. Co., 130 Cal. 345, 349, 80 Am. St. Rep. 132, 62 Pac. 552.

PERSONALLY INTERESTED

A director can not vote on any question in which he has a personal interest, nor can he be counted to make a quorum of the board.[20] It is said that the court will not inquire whether he acted fairly or unfairly; he must not be subjected to temptation to advance his own interests. This rule was, however, greatly relaxed in a later case,[21] where it was said that a director is "not absolutely precluded from dealing with the corporation of which he is a director. Any transaction between them is subject to rigid scrutiny, and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but is not *ipso facto* void. The mere fact that the creditor was a director of the company does not render the transaction fraudulent." The court said, however, that there was previous authority of the board to make the contract, a sufficient number of directors voting therefor, excluding the two directors who were personally interested in the matter, and also that it was no fraud for these two directors to conceal from the

20 Shakespear v. Smith, 77 Cal. 638, 640, 11 Am. St. Rep. 327, 20 Pac. 294; Smith v. Los Angeles etc. Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; Davis v. Rock Creek etc. Co., 55 Cal. 359, 36 Am. Rep. 40; Blood v. La Serena etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Curtin v. Salmon River etc. Co., 130 Cal. 345, 348, 80 Am. St. Rep. 132, 62 Pac. 552; Smith v. Los Angeles Immigration etc. Ass'n, 78 Cal. 289, 292, 12 Am. St. Rep. 53, 20 Pac. 677; Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 364, 104 Am. St. Rep. 42, 78 Pac. 550; Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. 354; Bassett v. Fairchild, 132 Cal. 637-647, 52 L. R. A. 611, 64 Pac. 1082; by a divided court, overruling same case in department (6 Cal. Unrep. 458, 61 Pac. 791), where it was held that, the meeting being legally assembled, a majority of those present could pass any lawful resolution, Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 141 Pac. 399.

21 Schnittger v. Old Home etc. Mining Co., 144 Cal. 603, 606, 78 Pac. 9. See, also, California etc. Co. v. Cuddeback, 27 Cal. App. 450, 150 Pac. 379.

board the fact that it was really they who were lending the company the money, the corporation sustaining no detriment nor the directors obtaining any undue advantage over the corporation. Even if the interested directors had voted for the transaction, if there were enough not interested who voted for it, its validity would not be affected.[22] A director may purchase stock at an assessment sale for his own personal benefit, and no presumption arises that he is purchasing for the benefit of the corporation.[23] Directors may purchase corporate property at judicial sale on valid judgments held by them against the corporation.[24] A contract between a corporation and one of its directors by which the director obtains some property or advantage to himself is not absolutely void, but is voidable only at the instance of the corporation or of its stockholders. The corporation, however, may be estopped by acquiescences or laches from questioning its validity, and the right to avoid the contract must be exercised by the corporation itself, or a stockholder acting for it; it can not be transferred to another.[25] And in a mortgage foreclosure sale where the trustees sold the property to a bank in which they were interested, the bank being the highest bidder, some injury must be shown by the stockholders in order to set the sale aside.[26] See President and Officers, post.

22 Ibid, citing Porter v. Lassen etc. Co., 127 Cal. 261, 59 Pac. 563.

23 Stephens v. Lemoore etc. Co., 22 Cal. App. 579, 135 Pac. 707.

24 Snediker v. Ayers, 146 Cal. 407, 80 Pac. 511.

25 Fudickar v. East Riverside etc. Dist., 109 Cal. 29-41, 41 Pac. 1024, Graves v. Mono Lake etc. Co., 81 Cal. 303, 22 Pac. 665; Lackenbach v. Finn, 26 Cal. App. 482, 147 Pac. 471.

26 Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238 66 Pac. 204; Herbert Kraft Co. v. Bryan, 140 Cal. 73, 79, 73 Pac. 745.

RATIFICATION BY STOCKHOLDERS INEFFECTIVE

In a case where the vote of a salary to a vice president and general manager was made at a directors' meeting where the presence of the vice president was necessary to make a quorum, not only was the action of the board void, but it was assumed in the dissenting opinion that a ratification of the acts of the board of directors by the stockholders did not cure it because this vote was not an "act" of the board, and because it was not within the power of the stockholders to vote away any of the funds of the corporation against the protest of the minority of the stockholders;[27] still the officer was entitled to a *quantum meruit* compensation for his services, and receiving and retaining the benefits of a note executed without proper authority estops the corporation from disputing its validity.[28] But if an act is contrary to law it is incapable of ratification, and equity will not enforce any rights claimed under such an act.[29]

Even if a stockholders' meeting increasing the number of directors is subject to attack as to its validity, yet the additional directors being elected and exercising the duties of that office for a long time, covering later stockholders' meetings, without objection by any of the stockholders, they are estopped from questioning the acts of such directors otherwise legal.[30] The court says further that the increased board were *de facto* directors and, so far as third persons are concerned, their acts are as valid and binding on the corporation as if they were *de jure* officers, and deny the application of the rule (as in public offices) that there can be no

27 Bassett v. Fairchild, 132 Cal. 637-647, 651, 652, 52 L. R. A. 611, 64 Pac. 1082.

28 Curtin v. Salmon River etc. Co., 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851.

29 Martin v. Zellerbach, 38 Cal. 300, 311, 99 Am. Dec. 365.

30 Chandler v. Hart, 161 Cal. 405, Ann. Cas. 1913B, 1094, 119 Pac. 516.

de facto officer where there is no *de jure* office, in cases like this.

The fact that two corporations have some directors in common does not make the transaction void if the relation has not been abused.[31] Such transactions can be avoided for fraud, but may be acquiesced in until benefits are received which can not be returned, when they can not be repudiated.[32]

In the Sausalito case, however, the court makes a quotation from an Alabama case, saying that "the correct doctrine is well stated" therein, which quotation goes much further than any of the previous California cases. It is briefly as follows: "Such a transaction may be avoided by either company, or at the instance of a stockholder of either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be. . . . The general rule is that such dealings are not absolutely void, but are voidable, . . . they become binding if acquiesced in by the corporations and their stockholders." But it was held that a contract by the president of a corporation, in the name of the corporation, with a partnership of which he is a member is invalid, although if there is no fraud, a *quantum meruit* may be recovered.[33] But later it was said a contract between the president of the corporation with the corporation is voidable and will

31 Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710; Sausalito Bay etc. Co. v. Sausalito Imp. Co., 166 Cal. 302, 306, 136 Pac. 57; Reclamation Dist. v. Birks, 159 Cal. 233, 237, 113 Pac. 170; Manning v. App etc. Min. Co., 171 Cal. —, 154 Pac. 301.

32 San Diego etc. R. Co. v. Pacific etc. Co., 112 Cal. 53-58, 33 L. R. A. 788, 44 Pac. 333, and cases in following note.

33 Sims v. Petaluma etc. Co., 131 Cal. 656, 63 Pac. 1011; reversing s. c. 6 Cal. Unrep. 540, 62 Pac. 300.

be set aside irrespective of its fairness.[34] The directors of an insolvent corporation can not secure any preference for themselves[35] by buying its notes at a discount. But if the agent purchased with authority, the corporation would owe to him the amount paid by him for the claims.[36]

HAVING SAME STOCKHOLDERS

The fact that two corporations, one engaged in one kind of business and the other in another kind, although they have the same stockholders, is not sufficient in itself alone to impute liability of one corporation for the act of the other.[37]

RESIGNATIONS AND SUCCESSORS

If a director tenders his resignation as such "to take effect upon acceptance," the resignation is not effective until it is accepted, and he may attend all meetings of the board and vote therein, in the meantime.[38] The resignation being accepted, the court says "it can not be questioned that the board had power to accept the resignation of a director and to elect his successor."

INJUNCTIONS

The supreme court has said that injunctions affecting the course of proceedings of a corporation is the exercise of a delicate power, requiring great caution

[34] Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

[35] Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439; Davis v. Rock Creek etc. Co., 55 Cal. 359, 361, 36 Am. Rep. 40.

[36] Sullivan v. Triunfo etc. Co., 39 Cal. 459-468.

[37] Collom v. Roos Bros., 25 Cal. App. 73, 142 Pac. 858; Atkinson v. Western etc. Syndicate, 170 Cal. 503, 150 Pac. 360, 363.

[38] Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 626, 120 Pac. 15.

and sound discretion, and rarely, if ever, should be exercised in a doubtful case, and in the case before them refused to restrain the payment of dividends or interfere with the voting at elections.[39]

MUST BE ASSEMBLED

Another rule very rigidly adhered to in this state, although widely departed from in other states by virtue of statutes or regulations contained in their Articles, is that the board of directors can do nothing except when duly assembled.[40] It is said that "the question when they shall be considered duly assembled is not settled by the statute."[40] See Civil Code, sec. 308, post.

The fact that a director who had tendered his resignation "to take effect upon acceptance," the same not having been accepted, stated that he would not attend the meeting, but actually did so, is not a fraud upon the corporation, and will not affect the legality of the meeting, although his presence was necessary to make a quorum. And this was held to be true, although another director failed to attend on account of that statement, thinking there would be no quorum present without him.[41]

VACANCIES

The fact that one or more vacancies exist in the board does not affect the validity of a mortgage authorized by a majority of the full board.[42] In this case the

39 Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.

40 Harding v. Vandewater, 40 Cal. 77, 83; Salfield v. Sutter County etc. Co., 94 Cal. 546, 29 Pac. 1105; Smith v. Dorn, 96 Cal. 73, 83, 30 Pac. 1024; Curtin v. Salmon River etc. Co., 130 Cal. 345, 348, 80 Am. St. Rep. 132, 62 Pac. 552; Citizens' Security Co. v. Hammel, 14 Cal. App. 564, 112 Pac. 731.

41 Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 626, 120 Pac. 15.

42 Porter v. Lassen County etc. Co., 127 Cal. 261, 59 Pac. 563.

full board consisted of five directors, there being one vacancy; one of those present, however, was an interested director, but a majority of the full board excluding the interested director voted in the affirmative. It was said such must be the rule when the corporation is dealing with strangers; but it is intimated, though not decided, that the rule might be different when the board has taken action adverse to the stockholders, like levying assessments, where it may be said the directors owe a duty to keep the board full for the benefit of the experience and advice of a full board in such cases. But this intimation overlooks the latter clause of section 308, which declares that "a majority of the directors is sufficient to form a board for the transaction of business, and every decision of the directors forming such board, made when duly assembled, is valid as a corporate act." See comments on that section.

PLACE OF MEETING

The place of meeting of the board of directors must be at the office or principal place of business of the corporation (Civil Code, sec. 319). For decisions on this subject, see this section, ante, and comments, under subject of Meeting of Stockholders.

DIRECTORS ARE TRUSTEES

Directors of corporations are trustees of the stockholders, and the statutes defining the duties and obligations of trustees and agents to their principals, and particularly sections 2229, 2230, 2234, and 2322 of the Civil Code, are applicable to them.[48] But the district court of appeal said that this rule "applies only in respect to their acts relating to the property or busi-

[48] Graves v. Mono etc. Mining Co., 81 Cal. 303-319, 22 Pac. 665; Pacific Vinegar etc. Works v. Smith, 145 Cal. 352-364, 104 Am. St. Rep. 42, 78 Pac. 550, and cases cited.

ness of the corporation," and that it does not extend to their private dealings with stockholders in which they take advantage of knowledge gained by them as such directors.[44] This dangerous limitation opens the door for the entrance of countless fraudulent practices.

DIRECTORS HOLDING OVER

Must perform their duties with the same fidelity as if regularly re-elected, and are subject to the same liabilities.[45]

DE FACTO DIRECTORS

A corporation can not allege that its obligation is invalid because its creation is dependent upon the vote of a *de facto* director, nor that its secretary is also *de facto*,[46] and *de facto* directors may levy valid assessments on the stock.[47]

ORGANIZATION OF BOARD

Section 308 of the Civil Code is as follows:

> **§ 308.** Immediately after their election, the directors must organize by the election of a president, who must be one of their number, a secretary, and treasurer. They must perform the duties enjoined on them by law and the by-laws of the corporation. A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a major-

[44] Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; but see 3 Pom. Eq., sec. 1090, and cases cited; 2 Thomp. on Corp., secs. 1218, 1240, 1258, and 1259.

[45] Kinard v. Ward, 21 Cal. App. 92, 130 Pac. 1194.

[46] Barrell v. Lake View etc. Co., 122 Cal. 129, 54 Pac. 594. See, also, San Jose Sav. Bk. v. Sierra Lumber Co., 63 Cal. 179, and Robinson v. Blood, 151 Cal. 504, 506, 507, 91 Pac. 258.

[47] San Joaquin Land etc. Co. v. Belding, (Cal.) 35 Pac. 353; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

ity of the directors forming such board made when duly assembled is valid as a corporate act. (Enacted March 21, 1872.)

ELECTION OF OFFICERS

The officers can not be appointed in the Articles; they must be elected by the directors.[48]

In construing the meaning of the word "election" in the section in regard to courts reviewing the proceedings of an election (as we have seen under Civil Code, sec. 307) the court says *(dictum)* that in section 308 the word "election," referring to the directors, means the vote by the stockholders, while the "election" of the president signifies only the appointment by the board of its own officers, and that the provisions of section 303 in regard to providing in the by-laws for "the manner of election and the tenure of office of all officers other than the directors" have reference to the appointment of such officers rather than to an election of them in the manner provided for the election of directors.[49] The meaning of the word "election" in this section has never been squarely before the court and, notwithstanding what is said above, we think the word retains enough of its proper meaning (especially as the legislature could have here used the word "appointment" but did not) to make it safer, possibly necessary, for the directors to make the appointment of officers by ballot.

It will be observed that the president must be a director,[50] but it is not necessary for either the secretary or treasurer to be either directors or stockholders.

[48] Rideout v. National Homestead Ass'n, 14 Cal. App. 349, 112 Pac. 192.

[49] Wickersham v. Brittan, 93 Cal. 34-39, 15 L. R. A. 106, 28 Pac. 792, 29 Pac. 51.

[50] Dulin v. Pacific etc. Co., 103 Cal. 357-364, 35 Pac. 1045, 37 Pac. 207.

DUTIES

The only duties to be performed by the officers expressly commanded by the statutes are those enjoined on them by law or the by-laws; the expression "by law" is not confined to statutes, but includes also the principles of the common law which give the directors the power to require of the officers the performance of all acts desired by the directors which are not unlawful. If the officers refuse, resort may be had to the courts for mandamus to compel them to do the lawful acts refused.

QUORUM

The language of this section does not make it clear whether a quorum of the directors, which it declares shall be "a majority of the directors," shall be a majority of the full number provided in the Articles or a majority of those actually existing, when the full number is reduced by death, resignation, or failure to elect the full number. The English of the expression means, without the slightest doubt, the majority of those in existence. The statute does not say a majority of the full board, or use any other equivalent expression. If the Articles require twenty-one directors and there be four vacancies, there are but seventeen directors, and, according to the structure of the English language, a majority of the directors is a majority of the seventeen, not a majority of the directors in existence and of the vacancies also.[51] In any event a

[51] Cook on Corporations, sec. 713a, without comment or citation of authority, says: "A majority of the whole board of directors constitutes a quorum." It will be observed that he does not say a less number, under some circumstances, may constitute a quorum. Thompson on Corporations makes no statement as to the American law and cites no authorities; the English statutes are very different from ours, or those usual in the United States. See Tidewater So. Ry. Co. v. Jordan, 163 Cal. 105; 124 Pac. 716.

majority of the quorum must vote for a resolution to make it legal.[52]

Our own supreme court has said that a body of directors consisting of four persons, there being one vacancy (the statute then, as also the by-laws, requiring at least five directors), constituted the board of directors of the corporation; and this in so important a matter as mortgaging the property of the corporation. Indeed, one of these four directors, the president, was interested in the transaction and therefore the court said he could not legally vote or be counted to make a quorum, but, all four voting for the issuance of the mortgage, the court held that three votes, a majority of the full board, were sufficient and that the mortgage was valid;[53] and subsequent recognition of the validity of the mortgage by the full board, calling for further advances under it, is a ratification of its validity. Therefore, the board of directors does not mean all who might be elected, but those who are in existence, even if a less number than the corporation is required by the statute to have. A majority of the directors can not reasonably be said to be a greater number than a majority of the board of directors. Quite significant on this question is the language contained in the corporation laws of 1850 and 1853, which were the basis of the act of 1872, the exact language of which was copied in many sections of the code of 1872. The above section of the code was adopted in 1872 and has not been changed since. The corresponding section of the act of 1853 provided that "a majority of the whole number of trustees shall form a board for the

[52] Smith v. Los Angeles etc. Ass'n, 78 Cal. 289-292, 12 Am. St. Rep. 53, 20 Pac. 677.

[53] Porter v. Lassen County etc. Co., 127 Cal. 261, 59 Pac. 563; Schnittger v. Old Home etc. Co., 144 Cal. 603-607, 78 Pac. 9.

transaction of business," etc.[54] In the act of 1872 this language was changed to "a majority of the directors is a sufficient number to form a board," etc. This change is conclusive evidence that the legislature did not intend to continue the requirement of a majority of the full board, and the language used to accomplish the change is apt, and can not be otherwise construed except by forcing the construction.

But, however logical this conclusion may be, safety, and freedom from all doubt or question are the most important considerations in corporation matters, and therefore no important action should be taken without a majority of all the directors authorized by the Articles of Incorporation being present, and a majority of that majority (if not interested in the transactions) can do all things lawful for a majority of the board to do. Even a majority of the authorized board can not do some things, such as carrying out one of the methods (Civil Code, sec. 359, subd. 5) of creating a bonded indebtedness.

If a director is interested in a matter coming before the board, neither can his vote thereon be counted nor can he be counted for the purpose of constituting a quorum.[55]

DULY ASSEMBLED

This requirement means not only a meeting, but other sections of the statutes (Civil Code, sec. 319)

[54] Stats. 1853, sec. 7, p. 88; Gashwiler v. Willis, 33 Cal. 11, 19, 91 Am. Dec. 607.

[55] Curtin v. Salmon River etc. Co., 130 Cal. 345, 349, 80 Am. St. Rep. 132, 62 Pac. 552; Porter v. Lassen County etc. Co., 127 Cal. 261, 59 Pac. 563; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Shakespear v. Smith, 77 Cal. 638, 640, 11 Am. St. Rep. 327, 20 Pac. 294; Chamberlain v. Pacific Woolgrowing Co., 54 Cal. 103. This rule was recognized in Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Schnittger v. Old Home etc. Co., 144 Cal. 603, 78 Pac. 9.

require the meeting to be held at the office of the principal place of business of the corporation, and, under the decisions, a meeting is not fully assembled where all are not present, or at least the meeting properly and authoritatively called and all notified (unless it is a regular meeting and notice of it is dispensed with in the by-laws under the permission given in Civil Code, sec. 303). Where all the directors were not duly notified of a special meeting and those not notified were not present, though a quorum was present, it is not duly assembled, and all action taken at such a meeting is void.[56]

The first case on the subject of the board being able to act only when duly assembled was where the stockholders voted to sell certain real estate, the members of the board being present in the stockholders' meeting and voting in the affirmative. But the court said the directors did not meet as directors but as stockholders, and that the stockholders alone could not sell the property, but that the directors must also resolve to do so, and there being no action by the directors assembled as a board, the attempted sale was void.[57] The absence of a resolution of the board renders the instrument void.[58] And as an agreement to sell real estate must be in writing, it can be authorized only by the "board of directors," when duly assembled, by resolution duly passed and recorded.[59]

[56] Pauly v. Pauly, 107 Cal. 8, 18, 48 Am. St. Rep. 98, 40 Pac. 29; Salfield v. Sutter County etc. Co., 94 Cal. 546, 549, 29 Pac. 1105; Curtin v. Salmon River etc. Co., 130 Cal. 345, 348, 80 Am. St. Rep. 132, 62 Pac. 552.

[57] Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

[58] Alta Silver Min. Co. v. Alta Placer etc. Co., 78 Cal. 629, 633, 21 Pac. 373; Southern California Colony Ass'n v. Bustamente. 52 Cal. 192.

[59] Salfield v. Sutter County etc. Co., 94 Cal. 546, 548, 549, 29 Pac. 1105.

CALLS

It has also been said that "where there is no different provision in the charter or by-laws of a corporation, such meetings must be called by giving personal notice to each member of the board," and, if this is not done, the meeting is not duly assembled.[60] When no provision is made in the by-laws for notice of a special meeting of the directors, the manner of giving such notice is then prescribed by section 320 of the Civil Code.

A by-law providing that there shall be entered in the minutes a record of the service of notice of a special meeting of the directors, and that upon that record being read and approved at a subsequent meeting it shall be conclusive upon the question of service, does not prevent proving by witnesses that absentees were duly served with notice of the meeting.[61] Nor is it necessary to prove that the absentees were served with notice when the minutes showing a quorum was present were read in evidence without objection; it is incumbent on those assailing the validity of such a meeting to show the facts which would make it illegal.[61]

Many matters, in the course of the ordinary business of a corporation, are not of great importance, yet they must be done by the board of directors. Seldom is the business of a corporation the only business which the individuals constituting the board have to do; generally directors are actively engaged in many other matters, and they are usually selected for the reason that they are successful in other matters. To require them to assemble for every trivial thing often causes much trouble and delay, and is a great obstruction in conducting the business. This requirement is becoming

60 Harding v. Vandewater, 40 Cal. 77-83.

61 Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289.

archaic. In many of the states, especially in the eastern part of the United States, statutes provide that resolutions signed by the directors (usually the requirement is unanimously) shall be entered in the minutes by the secretary, and when so entered shall have the same force and effect as if they were passed at a duly assembled meeting. For like reasons there should be a similar law in this state. Also there should be a statute enabling a minority of the directors to adjourn from time to time until there is a quorum present.

IMPROPER CALL—NOT LEGALLY ASSEMBLED

The by-laws of a corporation provided that a call for a special meeting of the directors should be given on the order of the president, or, if there be none, on the order of two directors. This is substantially the language of Civil Code, sec. 320. The president refused to make the call, whereupon it was made by two directors. At the meeting four of the directors were present without protest, and the remainder, three, "were present in the office attending to other business, but took no part in the business of the directors' meeting, except to protest against the whole proceedings." At this meeting a resolution was passed to sell all the property of the corporation in payment of its debts. The court held that the two directors did not have authority to call the meeting, and therefore that the meeting was not duly assembled, and that it could not do any valid act.[62] This is carrying technicality to the utmost length.

ADJOURNMENTS DEFECTIVE

Where a regular meeting, at which two of the directors were not present, adjourns until the next day,

62 Smith v. Dorn, 96 Cal. 73, 81-83, 30 Pac. 1024. See cases and comment under Civil Code, sec. 320 post.

without fixing the hour of the meeting, the court held that such meeting was a special meeting, requiring notice thereof to the directors not present at the regular meeting, and as no notice was given to them all action taken at the adjourned meeting was void.[63] This decision was made to rest on the fact that the hour of the meeting was not named, and that an inspection of the minutes, if made, by the absent directors would not disclose the hour to which the meeting adjourned. But the absent directors should have been present at the original meeting; a quorum was present at the adjourned meeting, and the vote of the absent directors could not have changed the result. It does not appear that the absent directors ever examined the minutes of the meeting making the adjournment, therefore that part of the argument was hypothetical. The facts of the case show that there was no real substance in the objection—a technicality entirely naked. So, too, where there was really no meeting, on account of the regular meeting day being a holiday, the secretary noted in the minutes that on that account the meeting was adjourned to the following day.[64] It is intimated in this case, but not decided, that an adjournment of a preceding meeting to a day beyond the next regular meeting day is invalid. Such will certainly be the decision when a case is presented requiring this question to be determined.

But in a later case it was held that, all the directors being assembled and adjourning to a time named, at which adjourned meeting the majority of the directors were present, the meeting was legal, and the meeting

63 Thompson v. Williams, 76 Cal. 153-155, 9 Am. St. Rep. 187, 18 Pac. 153. But a corporation is estopped from raising the question if it has received benefits thereunder, Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 141 Pac. 399.

64 Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

was duly assembled, although no notice of the meeting was given to each director.[65] In a still later case it was decided that, a meeting having been regularly called, a quorum being present, and the by-laws providing that a quorum could adjourn a meeting from time to time, an adjourning of this meeting was legal, although no notice of the adjournment was given, that the directors in such a case were bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting, distinguishing Bank etc. v. Johnston, 133 Cal. 185, 65 Pac. 383.[66] It is difficult to see how the above provision of the by-laws is material, in view of the provision of section 308 of the Civil Code that "a majority of the board of directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board made, when duly assembled, is valid as a corporate act."

It has been held that, where less than a quorum attend a regular meeting, this minority have no power to adjourn the meeting to a subsequent day. The district court of appeal said, quoting Civil Code, section 308, "Unless a quorum is present and acting, no business performed or act done is valid as against the corporation," and that "the adjournment was an act done, and hence, under the provisions of the code, it was not a valid act." The court calls attention to the fact that the statute expressly empowers a minority of the stockholders to adjourn from day to day, but makes no such provision in regard to the directors.[67] But

[65] Bank of National City v. Johnston, 6 Cal. Unrep. 418, 60 Pac. 776-778, decided by the supreme court of California, but not published in the official reports; but see s. c. 133 Cal. 185, 65 Pac. 383.

[66] Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 627, 120 Pac. 15.

[67] Raisch v. M. K. T. Oil Co., 7 Cal. App. 667-671, 95 Pac. 662. But this point must be raised by the pleadings, Union Savings Bank v. Rinaldo, 6 Cal. App. 637-640, 92 Pac. 873.

from the other reasons given this result is a *non sequitur*. In a very late case where the by-laws provided that the regular meetings of the directors shall be held on the first Monday of each month, and that no notice of such meetings should be necessary, and one of these meeting days fell on a holiday, it was held that the meeting should have been held on the holiday; and a meeting held the following day without notice to all the directors and the levy of an assessment at such meeting were void. Section 11 of the Civil Code authorizing contracts to be performed on the day following a holiday when the time for performance falls on a holiday has no application to such a case, for the by-laws, and meetings thereunder, are not a "law or contract" within the meaning of that section;[68] a legal meeting could have been held on the holiday.

ADJOURNED MEETING—LIMIT OF POWER

But the Johnston case above cited went up to the supreme court again, when it was said by a divided court that the adjourned meeting could do no business which the original meeting could not have done, unless all the directors were present (in this case to order the collection by suit of an assessment previously levied, which though then delinquent was not delinquent when the original meeting was held).[69] The opinion is not well supported by the cases cited, some of which are on other lines of law like municipal corporations, and most of them antiquated and no longer authority. If the meeting were originally called for a special purpose, and some of the directors were absent from the meeting making the adjournment, the case would be different, but the true rule is that a special

[68] Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

[69] Bank of National City v. Johnston, 133 Cal. 185, 189, 65 Pac. 383; Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

meeting, not limited as to business by the call, may do any business then lawful.

CALLING MEETINGS

Section 320 of the Civil Code is as follows:

> § 320. When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors. (Enacted March 21, 1872.)

It will be observed that the first clause of this section is very awkwardly expressed if the intention was also to provide a mode of giving notice of regular meetings of the directors when no provision on this subject is contained in the by-laws. If the by-laws make provisions for regular meetings but none for the mode of notice and do not dispense with notice, if this does not provide the mode of notice, there is no provision on the subject.

The presumption is that meetings are regularly assembled and that the proceedings are regular,[70] and where it is not shown whether a meeting is regular or special there is no presumption that it is special, and

70 Barrell v. Lake View etc. Co., 122 Cal. 129, 54 Pac. 594; Balfour etc. Inv. Co. v. Woodworth, 124 Cal. 169, 172, 56 Pac. 891; Mills v. Boyle Min. Co., 132 Cal. 95, 97, 64 Pac. 122; Bell v. Standard etc. Co., 146 Cal. 699-705, 81 Pac. 17; Robinson v. Blood, 151 Cal. 504, 506, 91 Pac. 258; Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809; Ætna Indemnity Co. v. Altadena etc. Co., 11 Cal. App. 26, 165, 172, 104 Pac. 470; Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289, to the same effect; and this is true if some of the directors are absent and when the minutes do not show affirmatively that notice of the meeting was given, and a refusal to allow proof of the giving of these notices was error.

in the absence of proof to the contrary, though not recited in the record, it will be presumed that due notice was given of a special meeting.

An issue of bonds was founded on the proceedings of directors' and stockholders' meetings, of which meetings either no notices, or notices defective in substance, were given, but substantially all of the directors and apparently all of the stockholders were present at the respective meetings. After the corporation has accepted and applied the proceeds of the bonds to its uses it can not attack the validity of the bonds on account of the notices.[71]

By-laws empowered the president, or two of the directors, to call special meetings of the stockholders, and provided that generally, when the president was absent or unable to act, the vice president should perform his duties. The president residing in another county near by, but being absent from the company's office, the vice president issued the notices of the meeting. The by-laws were silent as to who should make the call or issue the notices. The vice president was also the secretary. The court said this was a sufficient absence to authorize the vice president to act, and that it is not necessary that the president shall be out of the state or beyond communication.

The court also said that the notice itself was a sufficient official declaration or order to make a legal call. And that under section 320, above, it is not necessary that the secretary actually sign the call; it is sufficient if the call is signed by an officer authorized to make it, as in this case. That section merely casts on the secretary the duty of giving the notice, and implies

71 Lowe v. Los Angeles etc. Co., 24 Cal. App. 367, 141 Pac. 399

only that the person charged with that duty shall by some means see to it that the proper notice is given.[72]

Nor is it necessary that the notice state the object or purpose of the meeting.[73]

And it will also be presumed, in the absence of testimony, that the president was absent, when the action is by the vice president.[72]

In an earlier case,[74] not long before the case cited, where the by-laws were in identical language with the later case, it was said *(dictum)*, without comment, that as the by-law "does not designate the person by whom the notice is to be given, such notice must be given by the secretary as provided in the section" (Civil Code, sec. 320). In the later case no reference was made to this case.

But where a by-law required the notice to be given on the order of the president, or, if there be none, on the order of two directors, a call made by two directors when there was a president and he refused to make the call is invalid.[75] But in a case where the by-laws provided that "the annual meeting of the stockholders may be held . . . and shall be called as the directors may direct, or by a notice in writing by the president," the court said, "both the alternative methods provided are equally mandatory," and that if the directors failed to call the meeting it then became the duty of the president to do so; and the *mandamus* issued by the superior

72 Bell v. Standard etc. Co., 146 Cal. 699, 81 Pac. 17; Granger v. Original Empire etc. Min. Co., 59 Cal. 678-682.

73 Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 628, 120 Pac. 15; Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 643, 139 Pac. 91, and cases in the following note.

74 Curtin v. Salmon River etc. Co., 130 Cal. 345, 347, 348, 80 Am. St. Rep. 132, 62 Pac. 552.

75 Smith v. Dorn, 96 Cal. 73, 82, 30 Pac. 1024. See cases and comment on Civil Code, sec. 308 ante.

court was sustained.[76] A valid call may be made by *de facto* directors.[77]

A special meeting of the directors, of which no notice was given, and at which all the directors were not present, can not pass a valid resolution to mortgage the property of the corporation.[78] In an early case it was said, where there is no different provision in the by-laws for notice of meetings of the board, personal notice must be given, and the subsequent provisions of the statute that a majority shall form a board for the transaction of business does not change the rule that it must be "duly assembled," and its action was held invalid.[79]

It has been uniformly held, where the record of the proceedings shows that notice of the special meeting was served on each director, the recital is presumed to be true in the absence of evidence to the contrary, and that this section of the code does not require that the notice of the meeting should specify the purpose of the meeting,[80] and even where the resolution recites the absence of one of the directors, in the absence of evidence, it will be presumed that the proper notice was

76 Pennington v. George W. Pennington & Sons, 170 Cal. 114, 148 Pac. 790. On rehearing of some case from the district court of appeal, 19 Cal. App. 519, reversing the same; Stabler v. El Dora Oil Co., 27 Cal. App. 516, 150 Pac. 643; and see Mandamus under Election Disputes, under Civil Code, sec. 315 ante.

77 Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191.

78 Relley v. Campbell, 134 Cal. 175, 177, 66 Pac. 220.

79 Harding v. Vandewater, 40 Cal. 77; cited in Alta Silver Min. Co. v. Alta Placer etc. Co., 78 Cal. 629, 632, 21 Pac. 373.

80 Granger v. Original Empire etc. Min. Co., 59 Cal. 678-682; affirmed in Balfour etc. Inv. Co. v. Woodworth, 124 Cal. 169, 172, 56 Pac. 891; Barrell v. Lake View etc. Co., 122 Cal. 129, 132, 54 Pac. 594; Bank of National City v. Johnston, 6 Cal. Unrep. 418, 422, 60 Pac. 776.

given.[81] And there is no presumption that a meeting is a special one.[82] See section 308 of the Civil Code, and comments.

Notices sent by mail are sufficient where there is no proof that they were not received, even where the by-laws do not specially authorize that form of delivering notices.[83]

WAIVER OF NOTICE OF MEETING OF DIRECTORS

The legislature of 1915 added a new section on this subject.

Section 320a of the Civil Code is as follows:

> **§ 320a.** When all the directors of a corporation are present at any directors' meeting, however called or noticed, and sign a written consent thereto, on the record of such meeting, or if the majority of the directors are present, and if those not present sign in writing a waiver of notice of such meeting, which waiver is presented and made a part of the records of such meeting, the transactions of such meeting are as valid as if had at a meeting regularly called and noticed. (Stats. 1915, p. 939.)

This law helps matters very much. But it falls short of the law in many of the eastern states which provide that the absent director may file a ratification of the holding of the meeting, and of the proceedings done thereat; while this section appears to limit his right to signing simply a waiver of notice of the meeting, and that before the meeting occurs.

81 Mills v. Boyle Min. Co., 132 Cal. 95-97, 64 Pac. 122.

82 Barrell v. Lake View etc. Co., 122 Cal. 129, 132, 54 Pac. 594.

83 Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 9-11, 41 Pac. 809; Younglove v. Steinman, 80 Cal. 375-377, 22 Pac. 189; and a finding that a meeting was "duly and regularly convened" and that an assessment was "rightly and lawfully" levied includes a finding that the necessary notice was given.

REMOVAL OF DIRECTORS

Section 310 of the Civil Code is as follows:

> § 310. The board of directors may be removed from office by a vote of two-thirds of the members, or of stockholders holding two-thirds of the capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal.
>
> Meetings of stockholders for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes.
>
> Such calls must be in writing, and addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called.
>
> If the secretary refuses to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting.
>
> The notice must be given in the manner provided in section 301 of this title, unless other express provision has been made therefor in the by-laws.
>
> In case the board of directors is so removed, a new board may be elected at the same meeting. (Amended March 21, 1905; Stats. 1905, p. 558.)

As this section was originally adopted in 1872, it began: "No director shall be removed unless," etc. This enabled the holders of two-thirds of the stock to remove one director at a time, or all who had been elected by the cumulated vote of the one-third minority, and elect their successors, and thus to defeat the cumulative vote provisions of the statutes and constitution. It was amended in 1905 by substituting "The board of directors may be removed," etc., for "no director," etc., thus making it impossible to remove less than the whole board; on electing their successors the minority

will be able to elect as many directors as their cumulated vote will enable them to do.

This proceeding is quite distinct from the remedy provided in sections 312 and 315 of the Civil Code (see citations and comments on same), for the latter have to do with elections only, while the provisions of this section may be availed of to remove officers, the validity of whose election can not be questioned. No ground for removal need be set up, or exist—nothing but the will of the holders of two-thirds of the capital stock. In the nature of things it would be used where the ideas of the stockholders concerning the policy and conduct of the business of the corporation differed so widely from the ideas of the directors as, in the opinion of the stockholders, to justify their removal.

In construing a similar statute, which required certain action by the court, the court said that the proceeding is a special one, not according to the course of the common law, and, to invest a court with jurisdiction, the requisites of the act must be complied with, and it must so appear on the face of the record; otherwise the court has no jurisdiction to proceed.[84]

In the same case it was held that "a majority of the shareholders" (which that act required to sign a petition for removal of the directors and the election of successors) was not equivalent to, or the same as, "the holders of the majority of stock."

Corporations may always remove any of their agents who have no interest coupled with their agency.[85]

But whether a director may be removed by the corporation, in the absence of a statute conferring that

[84] Chollar Min. Co. v. Wilson, 66 Cal. 374, 376, 5 Pac. 670. The law was held applicable to mining companies also, In re Boston Min. etc. Co., 51 Cal. 624.

[85] San Joaquin Land etc. Co. v. West, 94 Cal. 399, 29 Pac. 785; Croly v. Board of Trustees of Sacramento, 119 Cal. 229, 234, 51 Pac. 323.

power, is not satisfactorily settled. Some cases, in other jurisdictions, say this may be done for cause, but what is sufficient cause is often difficult to determine. In the absence of a statute granting that power to courts, they do not have it—not even a court of equity.[86] The statement[87] concerning a director that equity "may remove him from his trust" is not warranted by the other decisions of our courts, nor by general authority, and was really *dictum* in the case where stated. The paragraph containing the above quotation was quoted in a later case,[88] by way of argument, but the court had declared that equity originally had no such power of removal, but that section 315 gave it. But the latter section covers only an election and right to the office—not the right to remove for an alleged cause. The Wickersham case holds that the fraudulent acts of a director may be set aside and that he may be restrained from committing threatened acts which would be a fraud, but that is about as far as a court of equity can go in this state. Especially is this true in view of the statutes, already considered, authorizing the courts to remove directors not legally elected, and two-thirds of the stockholders to remove the whole board at their will, either with or without actual cause. If the directors have the confidence of the stockholders, or of a sufficient number to elect them, certainly courts ought not to intervene on account of acts falling short of intentional fraud, or crime. All courts hold that directors or officers can not be interfered with in exercising their honest judgment, however mistaken it may be.

For removal of officers by the court, see Civil Code, section 315 *et seq.*

86 Neall v. Hill, 16 Cal. 145, 146-150, 76 Am. Dec. 508; Fischer v. Superior Court, 110 Cal. 129, 140, 42 Pac. 561, and cases cited.

87 Wickersham v. Crittenden, 93 Cal. 17, 32, 28 Pac. 788.

88 Whitehead v. Sweet, 126 Cal. 67, 72, 76, 58 Pac. 376.

CHAPTER XI

SUBSCRIPTION FOR STOCK

Nearly all the cases which involve the character and terms of subscriptions for stock, whether certain contracts are subscriptions, manner of payments thereon, etc., are cited and considered under the subject of liabilities of stockholders, assessments, and subscriptions in the Articles of Incorporation, to which subjects reference is made. There are a few cases, however, of interest which raise other points, and they will be noted here.

CONTRACT GENERALLY

It is not necessary that the subscriber's name appear in the Articles of Incorporation as a subscriber, nor that he sign the Articles. While he is entitled to stock upon payment of his subscription, his membership in the corporation is wholly foreign to the right of recovery. In enforcing such a subscription the contract of subscription is the basis of the suit, nor need an assessment be levied under section 332 of the Civil Code. Nor is any assignment of the subscription agreement to the corporation necessary where it clearly appears that the subscription was made for its benefit and in contemplation of its creation; the legal effect is to pay the corporation when organized.[1]

The terms of the statute become a part of the contract of subscription, and, as the obligation to pay

1 Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442-446, 108 Pac. 308. This case in effect so far overrules Monterey etc. R. Co. v. Hildreth, 53 Cal. 123, as to limit the rule announced in the latter case to proceedings to collect the amount of the subscription under section 332 of the Civil Code.

subscriptions is only upon call duly made, the duty to pay does not arise until the call is made, and therefore the statute of limitations does not begin to run until the call is made.[2]

An agreement to subscribe to the stock in a corporation does not make the subscriber a member of the corporation,[3] nor are the subscribers present at the organization of the corporation agents of those who are absent.[4]

A written offer to a corporation to purchase a certain number of its shares at varying prices, "the stock to be delivered as called for," payable in monthly payments not to be required in excess of certain sums, which offer was duly accepted by the corporation, is not simply an option to purchase but is a contract of purchase and sale.[5]

An attachment may issue against the property of a subscriber who is sued for a payment due upon his subscription according to its terms, there being no lien of the corporation either upon the stock certificate or the shares by virtue of the law or any contract made.[6] Evidence that a person subscribed for stock, it was said, is not proof that he owns the stock when the subscription was to be paid in cash and the subscriber had not paid or offered to pay for the same.[7] For many purposes, it is doubtful whether this is a correct statement of the law.

2 Glenn v. Saxton, 68 Cal. 353, 357, 358, 9 Pac. 420; Union Savings Bank v. Leiter, 145 Cal. 696, 705, 79 Pac. 441.

3 West v. Crawford, 80 Cal. 19, 29, 21 Pac. 1123.

4 Marysville etc. Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

5 Provident Gold Min. Co. v. Manhattan etc. Co., 168 Cal. 304, 142 Pac. 884.

6 Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

7 Bank of Yolo v. Weaver, 3 Cal. Unrep. 569, 31 Pac. 160, which was ordered not to be published in the official reports.

Where a subscriber to stock signed a prospectus stating that the corporation's building was to cost twenty thousand dollars, it was held that this did not require that that amount be subscribed before he was bound, and his acting as director and participating in the business of the corporation estopped him from rescinding his subscription.[8] A subscription on a separate paper, referring to "annexed" list and terms, is good although this paper is not actually annexed.[9]

SUBSCRIPTIONS FIXING TERMS OF PAYMENT

The subscriber for stock may fix the dates and amounts of instalments upon which the same shall be paid, and if the corporation continues solvent the subscriber can not be compelled to pay in any other manner. No assessment is necessary to collect such subscriptions; the corporation may sue upon the subscription contract.[10] This rule has the support of decisions in many states, and may be said to be established law. But it is wrong in principle, for it promotes favoritism and lays unequal burdens on subscribers, and such agreements are almost always secret—that is, unknown to other subscribers. A long line of cases holds such agreements, if secret, to be void, as our own court did in what appears to be the only case in our

8 Auburn Opera House etc. Ass'n v. Hill, 3 Cal. Unrep. 839, 32 Pac. 587, s. c. 113 Cal. 382, 45 Pac. 695.

9 Beedy v. San Mateo etc. Co., 27 Cal. App. 653, 150 Pac. 810.

10 Kohler v. Agassiz, 99 Cal. 9, 14, 33 Pac. 741; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; Ventura etc. Ry. Co. v. Hartman, 116 Cal. 260, 263, 48 Pac. 65; Ventura etc. R. Co. v. Collins, 5 Cal. Unrep. 469, 46 Pac. 287, 48 Pac. 1115; Union Sav. Bank v. Leiter, 145 Cal. 696, 706, 79 Pac. 441; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 446, 108 Pac. 308, and cases cited in these several cases. See Provident etc. Min. Co. v. Manhattan etc. Co., 168 Cal. 304, 142 Pac. 884.

appellate courts where that point was raised.[11] But the subscription, or a promissory note given therefor, may be enforced.

SUBSCRIPTION CAN NOT BE DIVERTED TO ANOTHER CORPORATION

Where the subscription was to the stock of either of two corporations, taken by the agent of both, and upon payment the subscriber elects to apply it to the shares of one of them, the funds thereof can not be diverted by the agent to the other corporation, notwithstanding both corporations were of the same character and the property of each was identical, and of the same value (shares of stock of another corporation), and that the shares of the corporation chosen by the subscriber were over-subscribed when he made his subscription.[12] The court went still further than this and said that the subscriber could not be compelled to take shares of the stock of the company which he chose, if such shares were furnished by other subscribers to the stock of that company. And if the purposes for which the corporation is formed are materially different from those named in the agreement the subscription can not be enforced.[13]

CANCELLATION OF SUBSCRIPTIONS

Our supreme court has said "a subscription for capital stock of a corporation can not be rescinded or cancelled, except for fraud or mistake, without the unanimous consent of all the stockholders, is too firmly

11 Quartz Glass etc. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648. See 1 Thomp. on Corp., subject: Subscriptions, Parol, and Secret Conditions. As to a condition subsequent, see Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772, s. c. 103 Cal. 624, 37 Pac. 638.

12 Gray v. Ellis, 164 Cal. 481, 129 Pac. 791.

13 Marysville etc. Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

settled to admit of controversy;"[14] or by the board of directors duly authorized thereto *(dictum)*.[15]

The district court of appeal (a rehearing being denied by the supreme court, but by a divided court) has gone to the extent of releasing a part of the several subscriptions, without the consent of the other stockholders having been obtained, and upon no showing of the insolvency of such subscribers other than the recital contained in the resolution of the directors releasing them, and in the absence of any by-law giving the directors such power.[16]

RESCINDING PURCHASE OF STOCK

An offer to rescind a subscription which is claimed to have been procured by fraud must be accompanied by an offer to return everything of value received under it, such as dividends, but this right will be lost by attending a stockholders' meeting and voting for an assessment and paying the same before offering to rescind,[17] and while the proof of the offer to rescind may be proved by circumstantial evidence the burden of proof is on the plaintiff.[18] But a subscription upon

14 Pacific Fruit Co. v. Coon, 107 Cal. 447-452, 40 Pac. 542; Silica Brick Co. v. Winsor, 170 Cal. —, 151 Pac. 425, distinguishing Thomas v. Wentworth, below.

15 Tulare Savings Bank v. Talbot, 131 Cal. 45-48, 63 Pac. 172.

16 Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 117 Pac. 1041, 1046. The reasoning of the opinion on these points is far from satisfactory or convincing; nor was it necessary to consider those questions to determine the rights of the plaintiff. The suit was by a creditor, no other stockholders being parties or apparently concerned. The releases which were held effectual were made before the debts sued on were incurred; therefore, so far as the plaintiff was concerned, it was the same as if those subscriptions had never been made.

17 Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107; Gifford v. Carvill, 29 Cal. 589.

18 Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

condition that a certain amount be subscribed does not bind the subscriber to take the stock unless that amount is subscribed.[19]

Where the purchaser of stock from a corporation was induced to make the purchase on the false representations of its officers that it was in a flourishing condition while it was, in fact, insolvent, he may recover the purchase money back in a suit against the receiver, there being no laches on the part of the purchaser in discovering the facts of the fraud, or in making his election to rescind.[20] This appears to be the first case arising in our state courts where rights of creditors were directly involved in a case of rescission of an actual purchase of stock, and the court discusses the question on general principles and the authorities.

Where a person purchased stock directly from the corporation upon the written agreement that, if upon examination of the property he should be dissatisfied with the stock, he should be entitled to return the stock to the corporation and receive his money back, and upon examination of the property he was dissatisfied and, offering to return the stock, demanded his money back (this agreement being thereafter extended for the period of six months), it was held by the district court of appeal[21] that he was entitled to recover his money and that the value of the stock was not the measure of damages, for the contract determined the amount of the recovery. No rights of creditors were involved.

19 Santa Cruz R. R. Co. v. Schwartz, 53 Cal. 106-110; California Southern Hotel Co. v. Russell, 88 Cal. 277, 280, 26 Pac. 105.

20 People v. California Safe D. etc. Co., 19 Cal. App. 414, 126 Pac. 516, 520. See Wallace v. Bacon, 86 Fed. (Cal.) 553; Newton Nat'l Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727, 20 C. C. A. 339.

21 Dickinson v. Zubiate Min. Co., 11 Cal. App. 656, 106 Pac. 123. See Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 104 Pac. 698, on question of venue of such an action, and that it is a transitory action.

In view of the doctrine that subscriptions can not be cancelled without the unanimous consent of the stockholders, as stated in a preceding paragraph, this decision is extraordinary. The extract from Cook on Corporations, quoted in support of the decision, is founded upon decisions in states where directors have quite a free hand in dealing with such matters, and therefore is not a support in California where a very different rule prevails. This was not a case of a condition precedent to the taking effect of the subscription, but was nothing more than a privilege given to the stock purchaser to really rescind the transaction, dependent entirely upon his own will or desire.

OVER-SUBSCRIPTION

When, usually by oversight, there is an over-subscription either on the amount offered or exceeding the amount of the capital of the corporation, the error is remedied by cutting down each subscription the necessary percentage to reduce the total to the proper amount. But the subscriber can not be compelled to take less than his subscription; in such a case he may elect to take none. No case of that kind has reached our appellate courts.

After the persons present had made their subscriptions, the promoter of a corporation subscribed for all of the remaining shares (other expected subscribers being absent). From time to time the absent parties appeared and made their subscriptions and were given their stock out of the subscription made by the promoter.

The court held that, under these circumstances, there was no over-subscription, and also said no formal assignment was necessary to substitute one stockholder for another, and that the release of a subscriber may be proved not only by the records, but as well by the

acquiescence of the stockholders, and by the fact that the corporation itself did not regard it as binding.[22]

SUBSCRIPTIONS BEFORE ORGANIZATION

An agreement to form a corporation and to subscribe a certain amount of the stock binds each subscriber to pay the amount of his subscription regardless of his refusal to participate in the organization of the corporation. Such an agreement is not illegal, nor against public policy, because it provides for payments in excess of the statutory powers of assessment. The mutual promise of each subscriber is sufficient consideration for the promise of each, but such an agreement does not make the subscriber a member of the corporation. (In that respect it is different from a subscription after a corporation is organized.) Nor need this agreement go into all details in regard to the organization of the company, or show where its place of business is to be; it is sufficient if it be legally incorporated.[23]

Such an agreement inures to the benefit of the corporation and after its organization it may enforce the subscriptions; if they run in favor of a promoter, the corporation is subrogated to the contract rights made with him as to the subscription. The promoters are the agents of the subscribers up to the time of the organization, but afterwards their agency for the subscribers ceases; and, if they act at all it is as agents for the corporation and have no interest coupled with the agency, the corporation can remove them as agents and collect the money itself. Nor does the abandonment by the agent or promoter of his agency affect the

22 Tulare Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

23 West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

rights of the corporation.[24] And a subscription is a contract, and in an action to enforce the same attachment will lie in a proper case.[25]

REPRESENTATIONS IN PROCURING

Matters of opinion, stated as an inducement to make a subscription (such as that the road would be completed within ninety days), can not be relied on to defeat the subscription, if the road should not be built within that time or at all.[26] But if the completion of the road to a certain point within a certain time is made a condition of the subscription, the subscription can not be enforced unless the conditions are fulfilled.[27]

It was said in an early case that fraudulent representations as to the value of the property proposed to be purchased may be proved to defeat a promissory note given for the stock,[28] but a finding that the property is valueless does not show that the stock is valueless.

There are many cases in other states as to the effect of representations made in procuring subscriptions or selling stock, but the line dividing responsibility and non-responsibility is indicated in the two cases above. Matters which are determined only by the future, such as when the corporation will earn dividends, how much they will be, the value of the stock at some future time, and all matters of that kind are, and can be, only

24 San Joaquin Land etc. Co. v. West, 94 Cal. 399, 29 Pac. 785. To same effect, and also that it is not necessary that the subscriber should sign the Articles of Incorporation, San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308.

25 Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

26 Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

27 s. c. in 103 Cal. 624, 37 Pac. 638.

28 Gifford v. Carvill, 29 Cal. 589.

matters of opinion, and the seller is not responsible if they are not realized. But misstatements of facts which exist or do not exist at the time, if material, make the subscription void, or make the seller of the stock responsible for the loss, if any. Of course, the agent or corporation may guarantee some things to occur in the future, which guaranty would be binding—for example, to complete its road within a certain time—but a corporation could not make a legal guaranty that dividends will begin within a certain time, or will be at a certain rate, though an individual could do so.

AGREEMENT TO REPURCHASE

Where a person subscribes for stock of a corporation upon consideration of a written agreement of certain stockholders that they will purchase the stock from the subscriber within a stated period at a price named, it was held that the subscriber was entitled to demand such purchase within the time limited and to recover also any assessments levied upon the stock in the meantime.[29]

[29] Gay v. Dare, 103 Cal. 454, 37 Pac. 466. Nothing in this case appears to show a consideration for this agreement. A similar rule has been established where one purchases bonds from another under a like agreement, Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996. Avery v. Cullen, 15 Cal. App. 413, 114 Pac. 1022, was a case where the seller of the stock agreed to repurchase the same if the purchaser should become dissatisfied with the stock. In Hudson v. Seeley etc. Co., 19 Cal. App. 213, 124 Pac. 1051, the case presented was considered as one of rescission.

CHAPTER XII

STOCKHOLDER'S RIGHTS AND DUTIES

The stockholders of a corporation do not hold any fiduciary relation to each other simply by reason of the fact that they are stockholders in the same corporation. This doctrine was declared in a case where stockholders voted upon a resolution where their individual interests were adverse to the other stockholders, as the ratification of a mortgage to themselves.[1] The corollary of this proposition, that is when the stockholders' interest is adverse to the corporation itself, has not been determined by our courts, but it may be said if the stockholder or stockholders do not control the corporation they may deal with it as freely as any other persons and owe it no greater duty in law. When the stockholders so dealing with the corporation are all the stockholders, they may make practically any contract with the corporation they please.[2]

Stockholders do not have the legal title to the property of the corporation, nor are they in any proper sense the owners of the property, but they have a direct interest in it consisting of the right to participate in its profits and the distribution of its assets upon its dissolution.[3]

STOCKHOLDER'S RIGHTS TO MAKE FURTHER SUBSCRIPTIONS

The rights of stockholders to subscribe, ratably, for new issues of stock have not been fixed by statute in this state, nor established by any decisions.

1 Middleton v. Arastraville Min. Co., 146 Cal. 219-224, 79 Pac. 889.

2 Turner v. Markham, 155 Cal. 562, 570, 102 Pac. 272.

3 Kohl v. Lilienthal, 81 Cal. 378, 385, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077.

A case, however, involving the rights of a stockholder to take or subscribe for shares in another corporation owned by and which were about to be sold by his corporation, has come before the courts. It was said that the corporation was not bound by any rule of law to limit the sale to its own stockholders, nor to prevent a stockholder from taking more than his ratable proportion, or from subscribing for the benefit of one not a stockholder; in short, that the corporation could exercise its sole judgment in that respect without restriction.[4]

NO MANDAMUS TO SECURE PRIVATE RIGHTS, ORDINARILY

It is one of the principles of corporation law that mandamus will not issue against the corporation or its officers to enforce contract rights of a personal nature, which involve no questions of trust or official duty, and where there is any other adequate remedy. But it was held in one case in this state that mandamus will issue against a mutual water company, furnishing water to its own members only, to compel it to supply a member with the water to which he was entitled, on the ground that his crops upon lands so irrigated would speedily perish without the water, and that there was no other speedy and adequate remedy.[5]

STOCKHOLDER'S SUITS IN BEHALF OF THE CORPORATION

A stockholder may bring an action, in behalf of the corporation, to recover money or property belonging to the corporation, or to prevent or set aside some fraudulent action, or indeed for any purpose beneficial to the corporation, when the directors refuse to bring such an action, or where the action would be against

4 Bacon v. Grosse, 165 Cal. 481, 487, 132 Pac. 1027.

5 Miller v. Imperial Water Co., 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227.

the directors themselves. But the fact that the suit is brought by a stockholder does not enlarge the scope of the action, nor add any matters to be redressed, nor change the method of procedure except in form. The matters which can be covered in such a suit are only those of which the corporation itself could complain. Any wrongs done to the individual stockholder, as distinguished from the entire body of stockholders, can not be made the subject of or be included in such a suit;[6] for such wrongs the stockholder must resort to his personal action against those who have wronged him, whether these be the directors or officers, or the corporation itself, or other stockholders.

SAME—DISABILITY OF CORPORATION

The Whitten v. Dabney case[7] establishes some doctrines which are quite new and, so far as corporations are concerned, without citation of supporting authorities, goes far beyond the decision in the district court of appeal where it was first heard.

On the rehearing in the supreme court, that court said while the corporation was under the control of the recreant directors it was powerless to act, and therefore in the matter complained of it was under a disability, like the disability of an infant.

An inevitable deduction, although not made by the court, is that the statute of limitations would not begin to run against the corporation itself in bringing the suit until a new board of directors, free from the domination of the persons who accomplished the fraud, was elected and put in control of the corporation.

[6] Turner v. Markham, 155 Cal. 562-570, 102 Pac. 272; Chetwood v. California Nat'l Bank, 113 Cal. 414, 45 Pac. 704, s. c. 113 Cal. 649, 652, 45 Pac. 854.

[7] Whitten v. Dabney, 171 Cal. —, 154 Pac. 312.

The "recreant board of directors" remained in control of the corporation until the beginning of the suit, and, for aught that appears, indefinitely thereafter. The fraud complained of was committed more than eight years before the suit was brought, and was in part discovered by a committee of certain stockholders about four years after its commission, but they brought no suit. The discovery by the plaintiffs was made shortly before they began the suit, and consisted of information imparted to them by that committee. The court said, though the stockholders represented by the committee may have been barred, that fact did not operate to bar any other stockholder who had not himself made the discovery and was not possessed of the information obtained by the committee, and that the statute did not begin to run against the plaintiffs until they had made their own discovery, which, as stated, was when the committee gave them information of the facts it had obtained.

The court extends its exemplification of the declared "disability" of such a corporation by saying, the stockholder goes "into equity seeking redress for a corporation under disability to obtain relief itself, precisely as the guardian *ad litem* goes into court to obtain redress" for a minor or incompetent; following with a statement of the duties and rights of such a guardian, and the power of the court over him, and declaring that a stockholder bringing such a suit "is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other." The statement of the similarity of the two classes of cases certainly is novel, and the results may be far-reaching.

It was further said, a settlement with some of the plaintiffs being interposed, "that composition agreement is cognizable by the trial court alone and will not

be given the slightest efficacy until, after scrutiny and examination, it shall be determined by that court that the corporation's rights are fully protected."

A motion was made to substitute the corporation in the place of the plaintiffs and the intervenor. A like disposition was made of this motion by saying that the court below "will grant or decline to grant it, with due regard to the rights of the corporation itself and to the indirect rights of its stockholders."

No citation of authorities is made in support of the declaration that in such a case a corporation is under any "disability," and that, therefore, to a certain extent, the court has control of the case; nor that any settlement or compromise of the case made by the plaintiff is subject to the approval or disapproval of the court; nor that the corporation may be substituted as plaintiff. It is believed that none can be found. But if "equity" is to retain the broad definition given to it by courts and enlightened jurists, the soundest reasons exist for sustaining the first two, where necessary to secure justice. Cases calling for the exercise of such extraordinary powers by a court could arise only where the stockholder was not prosecuting the action vigorously or in good faith; or where by his dismissal of the case the other stockholders would be barred by the statute of limitations from bringing a new suit; or where the compromise made by the plaintiff was made with funds of the corporation, thus diminishing the funds belonging indirectly to the other stockholders; and, perhaps, other cases which may be imagined.

If this decision does not declare new rules, at least it applies some old general principles for the first time to corporations; on the status of a stockholder suing in behalf of his corporation it is likely to rank with the decision in the early case of Dodge v. Woolsey. It

emerges from the confused mass of precedent and, being able to stand alone, unsupported by previous example, proves its right to be regarded as one of the great decisions in the evolution of corporation law.

But no stockholder, who is prosecuting the action in good faith, should be displaced by a substitution of the corporation as plaintiff, even if a new board of directors free from all the frauds complained of should replace the old board; he has proved his vigilance; the new board can offer nothing at that time but promises; the new board, by amendments, may change entirely the theory and character of the case; the corporation itself may be estopped from maintaining all, or some, of the causes of action—indeed many reasons can be foreseen why such a substitution should not be made, and none, except lack of vigor in prosecution or bad faith, can be imagined where it should be made. In an earlier case, Chetwood v. California Nat. Bank, cited hereafter, the supreme court said that the stockholder is entitled to control the suit, and sustained a settlement made by him.

GROUNDS FOR SUIT

In an early case, repeatedly approved, it was said, "It is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts when done would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred. And upon the same principle the court will, even after such an act has been done, relieve an injured stockholder from loss, if in the meantime no superior equity has intervened, nor the rights of innocent third parties

attached,"[8] and a stockholder may redeem corporation property sold on mortgage foreclosure and hold the corporation liable to him for the money advanced.[9]

But the stockholder can not interfere with the right of the corporation to bring or to refuse to bring the suit or to control it when brought, except when the directors are derelict in their duty in refusing to act, or are guilty of fraud in the maintenance of an action, and even then his suit must be brought in his own name and expressly in behalf and for the benefit of the corporation; the corporation must be made a defendant, and also the recreant directors (if the relief sought is against them), as well as the outside parties from whom recovery is demanded.[10]

When the directors or trustees repudiate the trust, and claim the title to the property, the stockholders may sue in behalf of the corporation without demand upon the directors or trustees to bring the suit or the election of new directors or trustees for that purpose,[11] or where, for any reason, such a demand would be use-

8 Wright v. Oroville etc. Min. Co., 40 Cal. 20-27, quoted with approval in Ashton v. Dashaway Ass'n, 84 Cal. 61-68, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 Pac. 1086; Shively v. Eureka etc. Min. Co., 129 Cal. 293, 61 Pac. 939; Wickersham v. Crittenden, 93 Cal. 17.

9 Wright v. Oroville etc. Min. Co., supra.

10 Cogswell v. Bull, 39 Cal. 320; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 Pac. 1086, and cases cited in the following notes. On the point that the corporation must be made a defendant and the further point that a dismissal of the action as to the corporation dismisses the whole action, see Beach v. Cooper, 72 Cal. 99, 13 Pac. 161; Moyle v. Landers, 3 Cal. Unrep. 113, 21 Pac. 1133. That the suit may be brought by one or several stockholders, see French Bank Case, 53 Cal. 495, and Harvey v. Meigs, 17 Cal. App. 353, 362, 119 Pac. 941.

11 Parrott v. Byers, 40 Cal. 614.

less,[12] such as the fact that the directors participated in and benefited by the fraud or acts complained of, or that the corporation is under the control of the defaulting or recreant directors. But the stockholders can not maintain such a suit where the demand made upon the directors was simulated, and did not disclose the real nature of the suit to be brought and was not fair dealing with the directors.[13]

See titles "Fictitious Stock and Bonds," for cases of complaints on account of issuing stock for property at an excessively high valuation, and "Promotion."

"The shareholder who sues on behalf of the corporation is unquestionably entitled to conduct, manage, and control the litigation" and his settlement of the case was upheld.[14]

Acting in good faith, it is proper for all the stockholders to issue all the shares of the stock of the corporation to themselves in exchange for property conveyed by them to the corporation, to acquire which was a part of the original purpose of the corporation;[15] subsequent stockholders can not complain in behalf of the corporation. At that moment of time, the corporation owning no property, its stock was absolutely valueless; it was perfectly legal and proper for all the parties in interest to sell any part or all of the stock of the corporation for anything of value, and in so

12 Moyle v. Landers' Adm'rs, 83 Cal. 579, 582, 23 Pac. 798; Ashton v. Dashaway, 84 Cal. 61, 69, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603.

13 Bacon v. Irvine, 70 Cal. 221-225, 11 Pac. 646; Morrison v. Stone, 103 Cal. 94-97, 37 Pac. 142.

14 Chetwood v. California Nat'l Bank, 113 Cal. 649-654, 45 Pac. 854.

15 Garretson v. Pacific etc. Co., 146 Cal. 184-188, 79 Pac. 838; Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710.

doing they committed no wrong against any person, and it was said that such transactions are so common as to be of almost daily occurrence.[16] And the legality of such a transaction is not affected by the fact that the title to the property was taken and held for a time by one of the proposed stockholders in trust for the corporation to be formed;[16] nor the fact that these shares were not issued until after other shares had been sold and issued to other persons;[15] nor that the contract was originally with promoters if subsequently adopted by the corporation.[17] And the board of directors named in the Articles of Incorporation for the first year, who hold until the first regular election thereafter, are competent to make all contracts during that time which a board elected at the regular annual meeting of the stockholders thereafter could make.[18]

Whether such stock is full paid, so far as creditors are concerned, until quite recently, was undecided in this state, the cases which came before the courts being where the stock was sold for less than par in cash, or, by agreement among the stockholders, no more than a per cent less than par was to be called, in which cases it was held the shares were not fully paid.[19] But, in a recent case, it was declared that where the directors knew the property, so taken, was worth no more than one-tenth of the par value of the stock, the transaction

16 Turner v. Markham, 155 Cal. 562-570, 102 Pac. 272; Whitten v. Dabney, 171 Cal. —, 154 Pac. 312.

17 Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70. But if the contract has not been adopted by the corporation, the promoter has no right to the shares, Morrison v. Gold Mountain etc. Min. Co., 52 Cal. 306, 307; Hawkins v. Mansfield G. Min. Co., 52 Cal. 513.

18 Middleton v. Arastraville Min. Co., 146 Cal. 219, 222, 79 Pac. 889.

19 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

was invalid as to creditors, although, if there was no actual fraud upon the stockholders, it might be good as to them.[20]

The right of minority stockholders to attack a transaction of the directors as fraudulent is not affected by the fact that it is executed; nor do the minority stockholders need to offer to place the defendants in *statu quo*, nor will the approval of the majority at a stockholders' meeting affect them or their rights.[21]

In a suit by stockholders to cancel stock issued and sold under an amendment to the Articles of Incorporation increasing the stock on the ground that the amendment is absolutely void, and therefore the stock void, the plaintiffs need not offer to return the money paid for the stock;[22] it is intimated that the purchasers of the stock must look to the corporation for a return of their money. But stockholders can not sue other stockholders who have fraudulently acquired title to some of the property of the corporation, for the proportionate value of such property; the corporation is the party to sue, or stockholders on behalf of the corporation.[23]

And it does not matter, in such a suit, whether all the plaintiffs be stockholders; if one of them is a stockholder that is sufficient.[24]

20 R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488; Garretson v. Pacific etc. Co., 146 Cal. 184, 79 Pac. 838; Merchants' etc. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091; but see Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166.

21 Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

22 McDermont v. Anaheim etc. Water Co., 124 Cal. 112, 56 Pac. 779.

23 Gorham v. Gilson, 28 Cal. 479, 481, cited in Kohl v. Lilienthal, 81 Cal. 378-385, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

24 Parrott v. Byers, 40 Cal. 614-626, cited in support of a suit by creditors against the directors for the misappropriation of one of them, in Winchester v. Howard, 136 Cal. 432, 433-446, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

In a stockholder's suit to set aside fraudulent credits to the defendants, and to cancel certain shares of stock fraudulently issued to them, charging that the defendants conspired to accomplish these purposes and to elect directors who would, and who did, carry out the will and purpose of the defendants, and that the defendants controlled the corporation and the directors, it was said that the directors should have been made parties to the action.[25] The reason for this was not stated, but probably it may be found in the prayer that those shares be cancelled, and for certain injunctions. While many decisions state that the directors are proper parties in stockholders' suits against the corporation, yet, where no relief is sought against the directors, clearly they are not necessary and there can be no valid reason for requiring them to be made defendants.

A claim of misjoinder of actions arose in this case, viz: "for conspiracy; for moneys fraudulently appropriated and converted; for cancellation of fraudulent issues of stock; for an accounting and injunction." The court held there was no misjoinder, saying: "The alleged conspiracy is not of the gist of the action; it is the acts done pursuant to the alleged confederation that constitute the cause of action. I can see no reason why a court of equity may not in the same action grant relief against the fraudulent misappropriation of money of the corporation; inquire into the fraudulent issue of stock to the same parties charged with such misappro-

[25] Harvey v. Meigs, 17 Cal. App. 353, 362, 364, 119 Pac. 941. The same was said in Moyle v. Landers, 3 Cal. Unrep. 113, 116, 21 Pac. 1133. It does not clearly appear in either case that any specific relief was asked against the directors; in such a case they are not even proper parties; they may be found to be necessary as witnesses, but for nothing more. In the latter case the opinion gave as a reason that the acts alleged "occurred with their connivance," which, of course, is no reason at all. If an injunction was asked against the commission of some act threatened by them, they might be necessary defendants, and certainly if some recovery from them was demanded.

priation; take an accounting to determine the extent of any misappropriation, and grant an injunction, if necessary, to prevent similar acts. Especially must this be so when it appears that all the acts complained of are part of a common design;" quoting, in support of these conclusions from earlier decisions in this state, "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means employed by the defendant to produce the grievance complained of."

The fact that the stockholder may have acquired his stock after the acts complained of was held not fatal to the action.[26] This is the rule in almost all courts. The conspicuous exception is the United States courts, where, principally to prevent transfers to persons who might bring suits in such courts, Equity Rule 27 (old number 94) was adopted.

Ambiguities and uncertainties of allegations, it was also said in this case, should be viewed with liberality, for the plaintiff, in the very nature of things, can not have so full knowledge of the facts as the defendants.

Where a suit is brought by a stockholder in behalf of the corporation against the president to account for money received as salary, in which action it was shown that the vote of the salary to the president was illegal, the president could not employ an attorney to defend the action and make it a charge against the corporation.[27] The court said the bank had no real interest in the contest. This language seems entirely too broad, especially as, if the salary had been legal, it surely had

[26] Harvey v. Meigs, supra, citing Just v. Idaho Canal etc. Co., 16 Ida. 639, 133 Am. St. Rep. 140, 102 Pac. 381, where this point is fully considered; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 383, 128 Pac. 1040.

[27] Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603.

the right to defend its acts, and it would be its duty to do so.

This subject of stockholders' rights and duties on other points is covered in the consideration of the various liabilities of stockholders to the corporation and to creditors, the right to vote, to give proxies, to consent to deeds and mortgages, to the sale of property to the corporation for stock, and pooling agreements and voting trusts.

LIMITATION

The statute of limitations on stockholders' suits in behalf of the corporation which are based upon the fraudulent acts of the directors, or upon frauds perpetrated against the corporation by others, does not begin to run until the discovery of the fraud by the stockholder beginning the suit.[28]

DIRECTORS

(See title, "Liability of Directors.")

LIBEL IN COMPLAINT

Where allegations of fraud, misrepresentation and embezzlement are of the very gist of the action, and relevant and material, there is no libel; it is privileged, and the party's malice or bad faith does not affect the privileged character of the publication.[29]

28 Whitten v. Dabney, 20 Cal. App. Dec. 22; on rehearing in the supreme court, this point was affirmed, 171 Cal. —, 154 Pac. 312; Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 369, 426, 41 Pac. 308; Moyle v. Landers, 3 Cal. Unrep. 113, 116, 21 Pac. 1133.

29 Gosewisch v. Doran, 161 Cal. 511, Ann. Cas. 1913D, 442, 119 Pac. 656.

CHAPTER XIII

PRESIDENT, OFFICERS AND AGENTS—POWERS AND DUTIES NO POWER ORDINARILY TO MAKE CONTRACTS

The courts have said: The president of a corporation has "no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such powers as have been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation,"[1] such as buying or selling ditches or real estate, and other matters. Without additional powers being given by the by-laws or the directors, the president can not bind the corporation by act or contract to any greater extent than any other director.[2] Nor can the secretary do so.[3]

Without referring to these cases the district court of appeal, recognizing the futility of adhering to rules, the reasons for which, if they ever existed, have long ago passed away, said "under the usages and customs of modern banking the president of a bank is no longer regarded as an ornamental magnet with which to

1 Blen v. Bear River etc. Co., 20 Cal. 602, 81 Am. Dec. 132; Black v. Harrison Home Co., 155 Cal. 121-126, 99 Pac. 494; Bliss v. Kaweah Canal etc. Co., 65 Cal. 502, 4 Pac. 507; and the authority of agents must appear, Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105; West v. Will C. Prather & Co., 7 Cal. App. 81, 93 Pac. 892.

2 Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981.

3 Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

attract deposits, but, on the contrary, now and has been, for several years, recognized as the executive head and most important agent in connection with banking operations. The reason for the rule that through banking usage the president's power was limited to transactions expressly authorized by the board of directors no longer obtains, and the rule should cease."[4] And still later it has been held that, although the resolutions granting authority to the president did not specifically authorize him to sign promissory notes in behalf of the corporation, yet, where the corporation has held him out as "possessed of power to perform all acts involved in its ordinary or usual business," the corporation will be held liable for the payment of all notes signed by the president in carrying on its usual business,[5] and where a party was employed as general manager "to handle the business in all its details" it was held that he could execute the corporation's promissory note in settlement for goods purchased,[6] and the maker of the note can not question the corporate capacity of the payee. No resolution appointing the president general manager is necessary, if it be shown that he acted as such.[7]

In another case it was held that the general custom of the president endorsing and selling promissory notes might be proved to sustain the legality of such acts, notwithstanding a similar by-law,[8] where a resolution of the board of directors gives this power.

But adding the word "president" after the signature does not necessarily make it the contract of the

4 Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 376, 105 Pac. 130.

5 Stevens v. Selma Fruit Co., 18 Cal. App. 242, 250, 123 Pac. 212.

6 Francis v. Western Screen Co., 22 Cal. App. 32, 133 Pac. 327.

7 Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

8 Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289.

corporation.[9] Where the president was also general manager, but he signed the contract only as president, it was held that he was acting in both capacities.[10]

A corporation is not estopped to deny the authority of the president to make a contract which is still executory and from which it has derived no benefit;[11] in such a case the by-laws may be introduced in evidence to show the extent of the power of the president.

A promissory note executed by the president of a corporation to himself, and assigned before maturity to a third party without previous authority of the directors to execute the same, is invalid, and the fact that a note was executed in this manner was held to be sufficient to charge the assignee with notice of want of authority to execute it.[12] Nor do both the president and secretary, nor any other person, have authority to execute a mortgage on the property of the corporation in the absence of a legal resolution of the board of directors; the consent of the stockholders is merely an additional requirement.[13] Neither is a contract executed by both the president and secretary, but not bearing the seal, admissible in evidence without proof of the genuineness of the signatures of the officers and

[9] Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082.

[10] California etc. Land Co. v. Cuddeback, 27 Cal. App. 450, 150 Pac. 379.

[11] Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981; Bliss v. Kaweah Canal etc. Co., 65 Cal. 502, 4 Pac. 507.

[12] Smith v. Los Angeles etc. Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

[13] Alta Silver Min. Co. v. Alta Placer etc. Co., 78 Cal. 629, 21 Pac. 373. Nor is the consent of the majority of the directors not in meeting assembled to the taking of personal property as security for rent valid, Citizens' Securities Co. v. Hammel, 14 Cal. App. 564, 112 Pac. 731. But if seal is attached, see Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855.

that they were authorized to execute the contract.[14] Nor are a note and mortgage executed by the authority only of a preliminary meeting of the stockholders, before the organization of the board of directors, valid.[15]

SEAL GENERALLY UNNECESSARY

The common law rule that a corporation was incapable of making contracts, or of appointing agents or attorneys, except by deed or power in writing under the corporate seal, has been so far relaxed by the demands of business that the courts have said that "there was a period in the history of corporations when the most ordinary transactions were required to be authorized by solemn resolution of the board of trustees, duly entered in their records, and authenticated by the corporate seal. With the multiplication of corporations having for their object nearly every business pursuit known to modern times, the formalities previously regarded as necessary, and which were illy adapted to pursuits requiring prompt action, have been greatly abridged. . . . They must act as individuals may act, through agents, and within the general scope of their ordinary business their managing agents can bind their principals, as can those of an individual, and if their agents transcend their powers, the corporations having knowledge thereof and not specially repudiating the act are equally bound as individuals

14 Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Barney v. Pforr, 117 Cal. 56-58, 48 Pac. 987. See brief discussion of a case where the letter was signed only in the name of the corporation without the addition of the name of the officer or person acting for the corporation, in In re Balfour etc., 14 Cal. App. 261, 268, 111 Pac. 615.

15 Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

would be under like circumstances."[16] This is an enlightened view of the situation. In another case the court said, that "the authority of the president, or other head of the corporation, to employ an attorney when the exigencies of his company require it has been repeatedly recognized."[17] But this case was distinguished, if not doubted, in a later one where it was said that in the absence of proof of a general course of business in which such contracts made by the president were recognized, a president could not employ special counsel when the corporation had regular attorneys.[18] But in a still later case, without citing the above case, the court said the secretary and acting manager could employ a physician to attend the employees of the corporation in case of injuries, this employment being sanctioned by a majority of the directors separately given but not acted on by the board in meeting

16 Greig v. Riordan, 99 Cal. 316-321, 322, 323, 33 Pac. 913. But without referring to this language, although the case was referred to, a very narrow construction was put on these powers in Rigby v. Lowe, infra. See, also, Shaver v. Bear River etc. Co., 10 Cal. 396; Mills v. Boyle Min. Co., 132 Cal. 95-98, 64 Pac. 122; see Hamilton v. Bates, 4 Cal. Unrep. 371, 35 Pac. 304. So a lease of land in the name of the corporation, made by the officers without the authority of a resolution of the board of directors, was upheld on the ground that the corporation was estopped to repudiate it, McQuaide v. Enterprise etc. Co., 14 Cal. App. 315, 111 Pac. 927. It was competent for the president, who had full charge of the affairs of the corporation, to make, file, and verify a claim for mechanic's lien, Coghlan v. Salvatore Quartararo, 15 Cal. App. 662, 668, 115 Pac. 664. Neither is a seal nor a resolution of the board necessary to show the authority of a secretary to assign a claim for collection, Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328.

17 Streeten v. Robinson, 102 Cal. 542, 36 Pac. 946; Crowley v. Genesee Min. Co., 55 Cal. 273.

18 Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634; itself distinguished in Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

assembled.[19] The latter statement is novel in view of the very strict declarations of the California decisions that the directors can do nothing except when in meeting. The power of the president to employ a physician under such circumstances was declared where no showing was made as to the assent of the directors either separately or in meeting.[20] We do not find that Pacific Bank v. Stone, *supra,* has ever been cited or approved, on the point of employment of attorneys, and we think it may be safely said that its statements are too broad.

It was also held that a by-law that "It shall be the duty of the president . . . to execute with the secretary . . . except when otherwise directed by the board of directors, all contracts . . . that may be executed or issued by this corporation" does not restrict the president's powers to the making of written contracts only; it required simply that he should execute them if they were in writing, and the validity of an oral contract by the president was sustained.[21]

IF BENEFITED BY THE CONTRACT

The rule that all contracts with a president or a director are absolutely void without regard to their fairness has been somewhat relaxed. A contract be-

19 Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817; Scott v. Monte Cristo Oil etc. Co., 15 Cal. App. 453, 115 Pac. 64; Rich v. Edison etc. Co., 18 Cal. App. 354, 123 Pac. 230.

20 Fraser v. San Francisco Bridge Co., 103 Cal. 79, 36 Pac. 1037; and if the employment was ultra vires, that fact must be shown; it will not be presumed. In this case, however, in the agreement, the corporation reserved the right to determine what was reasonable, and the court held that the physician was entitled to no more than the corporation offered, which was going to a remarkable length, making the corporation both the court and the jury as to the amount, and we do not think good law, Deane v. Gray Bros. etc. Pav. Co., 109 Cal. 433, 42 Pac. 443. See Trenor v. Central Pac. R. Co., 50 Cal. 222; Smith v. Sinbad Dev. Co., 15 Cal. App. 166, 113 Pac. 701.

21 Freyberg v. Los Angeles Brewing Co., 4 Cal. App. 403, 88 Pac. 378; E. W. McLellan Co. v. East San Mateo Land Co., 166 Cal. 736, 739, 137 Pac. 1145.

tween the corporation and one of its directors by which the latter gains some benefit has been held not absolutely void but voidable only, at the instance of the corporation or its stockholders, and they may be estopped from questioning it by ratification, laches, or acquiescence.[22] See post, Ratification, etc. But the president, who is also a large creditor of an insolvent corporation, resigning, can not take a conveyance of the property of the corporation to secure his claims; such a transaction is in fraud of the other creditors.[23]

Nor can he vote on any question in which he is personally interested, nor can he be counted in making a quorum, nor will the courts inquire whether he acted fairly or not; he must not be subjected to temptation to advance his own interests. See subject "Directors," ante, for the cases on this subject.

Nor can the president or a director make any secret profits out of a contract with third parties for selling the stock of a corporation.[24]

(See chapters on Directors, ante, and on Promoters, post).

CREDITOR IN CONTROL OF CORPORATION

The same rule has been applied, with great strictness, to a creditor being benefited by proceedings of a corpo-

22 Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024, and Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 55 Pac. 1062. Nor can directors renew a note of the corporation upon which they are endorsers, and, by subsequently paying the renewed note, hold the corporation, the original debt being more than three years old. O'Neill v. Quarnstrom, 6 Cal. App. 469, 92 Pac. 391. For an interesting case, see McQuaide v. Enterprise etc. Co., 14 Cal. App. 315, 111 Pac. 927; Lackenbach v. Finn, 26 Cal. App. 482, 147 Pac. 471, as to conversion by sheriff.

23 Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169; Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439.

24 Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

ration over which he has control, particularly in securing priority of lien or payment of his claim. The case was where one corporation held all the stock of another, and elected all its directors, and controlled all its acts. Every single act of the controlled corporation, beneficial to the controlling corporation, and prejudicial to the security of the bondholders of the former was set aside, without inquiry further than to ascertain the fact that the controlling corporation was benefited by it. It was said that the controlled corporation was merely "an agency" or a "creature" of the controlling corporation; that the latter occupied a fiduciary relation to the former, and to its stockholders and creditors; that it subjected itself to the restrictions which are imposed upon a director; indeed, that it exercised a power far wider than a director usually has, and, therefore, that its position was one demanding the utmost good faith in handling the corporation's affairs and assets, and that it can secure no preference or advantage over other creditors of the controlled corporation by using its powers for that purpose.

The court went still further, declaring that it was not necessary to show that the controlled corporation had a meritorious defense to the claims of the controlling corporation (upon which judgment by confession had been entered); the fraud was not that the judgment was rendered upon unjust demands, but in the abuse of the fiduciary relation which the latter sustained to the former when it attempted to secure a priority by the confession of judgment which it procured the controlled corporation to make.[25]

LOANS BY OFFICERS TO THE CORPORATION

Where a director advances money to a corporation at a time when it was out of money and in debt and unable to obtain it from any other source, which money

[25] Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. —, 152 Pac. 542, 556.

it receives and uses; the corporation must repay him the amount.[26] Shortly afterward a case arose where a director lent his corporation a large sum of money, taking notes and a mortgage therefor in the name of another person for whom he claimed to be acting. The validity of the transaction was sustained, but the court reduced the rate of interest on the ground that it was excessive and also reduced the excess of the amount of the mortgage over the money loaned (the excess being the estimated amount of future taxes). The reduction of the rate of interest was made on the ground that the lender used his position as director to obtain for himself an undue advantage.[27]

In a recent case,[28] the authorities are reviewed and the law on the questions arising in this character of cases is well expressed. The court says that, while a director, like any other trustee, is bound to act in the utmost good faith toward his beneficiary and may not advance his own interests to the disadvantage of the corporation, yet "he is not absolutely precluded from dealing directly with the corporation of which he is a director. Any transaction between them is subject to rigid scrutiny, and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but it is not *ipso facto* void. . . . The mere fact that the creditor was a director of the company does not render the transaction fraudulent. . . . The transaction was had under the authority of the corporation given at a meeting of the board of directors. . . . The votes of the other three members of the board were sufficient to make the resolution effective. . . . It was not a fraud upon the corporation, or upon the other members of the board, for these directors not to disclose the fact

26 Santa Cruz R. Co. v. Spreckles, 65 Cal. 193-199, 3 Pac. 661, 802.

27 Sutter St. R. Co. v. Baum, 66 Cal. 44-51, 4 Pac. 916.

28 Schnittger v. Old Home etc. Min. Co., 144 Cal. 603, 78 Pac. 9.

that they were the real parties who were loaning the money . . . unless it could be shown that thereby the corporation sustained some detriment, or they obtained some undue advantage over the corporation." And it was held that the claim that the object of this loan was to obtain control of the corporation by foreclosing the mortgage and buying in its property was without foundation; the corporation could pay the note, and if it did not and the property was sold under foreclosure it could be redeemed within the statutory time, either by the corporation or by any of its stockholders in its behalf; whatever had been the motive, the corporation had sustained no injury thereby.

So also it was held[29] that where one person was president of two corporations and he executes a note in behalf of one of the corporations to the other corporation for a valuable consideration which is not assailed, although there was no resolution authorizing the transaction, it may be ratified by entering the transaction in the books of the debtor corporation, which is notice to it, and, after such notice, retaining the consideration and accepting its benefits. Likewise, mortgage to the general manager of the corporation, properly authorized or ratified, is valid and its lien is superior to that of labor or other claims arising thereafter.[30]

Where notes issued by a corporation to its directors on the authority of their own votes had been adjudged invalid and cancelled for that reason, the validity of the indebtedness upon the consideration of the notes not being passed on in that proceeding, that judgment is not a bar to a subsequent suit to recover a *quantum meruit* for services rendered and money lent to and money expended by them for the benefit of the corpo-

[29] Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749. See, also, Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[30] Middleton v. Arastraville Min. Co., 146 Cal. 219-225, 79 Pac. 889.

ration; and this is true even if they be only *de facto* directors.[31]

An example of the circuitous route often selected by the law to reach an end, which may be arrived at quickly by direct ways, is a case involving the discount of commercial paper held by a corporation.[32] Apparently the corporation needed money and had no other means of raising it, and received the full value of the commercial paper in cash; at any rate there was no denial of these facts. But the iniquity of this transaction consisted in the fact that the president of the corporation was the one who discounted the notes and furnished the corporation with the needed money, without the previous knowledge of the other directors. Naturally, in indorsing the paper he did so in the corporation's name, because the notes were payable to the corporation. And naturally, the indorsement was made to himself, as he was the person furnishing the money. There is no claim that the notes were sold below par or that the president profited to the extent of a farthing by the transaction, although he would receive thereafter the interest which the notes bore, if they bore any interest before maturity, which fact does not appear.

The appeal covers two suits; one brought by the corporation against the president to cancel the indorsement on the notes to the president and to enjoin him from selling and transferring them, nothing more; the other a suit by the president against the maker of the notes, in which the corporation is joined as a defendant as indorser, for a judgment against both for the amount of the notes.

The judgment of the lower court was in favor of the president in both actions, *i. e.*, refusing to cancel the

31 Shively v. Eureka etc. Min. Co., 5 Cal. App. 236, 89 Pac. 1073.

32 Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550.

indorsements and for the recovery of the amount of the notes. Both judgments were reversed on appeal.

It should be observed at the outset that the court said "no question is involved in this action of the right of a director who has advanced or loaned money to a corporation to recover it back on a *quantum meruit,* and decisions which sustain such a right have no application," evidently referring to the cases mentioned above but not citing any in this connection.

It should also be observed that the measure of the *quantum meruit* of such a transaction is not the amount of profit made by the corporation as a result of it, nor whether the corporation made any profit at all, but the actual money advanced with legal interest. Therefore the amount of recovery in this case, on either theory, would be identical.

The opinion goes into these questions at much length, and cites numerous "authorities" in support of every one of its positions.

The reasons given for the conclusions are as follows:

The directors "can not use their official position to benefit themselves individually," which is not in point in this case, as there is no claim that the president benefited except as all stockholders benefited likewise. That "there must be the assent of two separate independent minds; that no man can effectually make a contract with himself." That the code provides that a trustee can take part in no transaction in which he *has an interest,* which is *adverse* to his beneficiary [italics ours] except in certain cases (of no interest in this connection), and that every such transaction is a *fraud* against the beneficiary. That "the law is inflexible, that one acting in such fiduciary capacity will not be permitted to deal with himself in his individual capacity relative to the trust property." And lastly that "the

court will not permit any inquiry into the question of the honesty or fairness of the transaction." Then it is stated that the "philosophy of this rule" is that temptation may be avoided by the trustee, and that "the value of the rule of equity . . . lies to a great extent in its stubbornness and inflexibility."

It will also be observed that these are rules in equity. Then follows a discussion of a number of California cases which apparently do not entirely coincide with all these general statements, maintaining that there is no actual conflict.

The logical result of these principles, if they are or should be principles, is that the money is lost. But this would be robbery. The firm adherence to logic (based on more or less erroneous postulates) in the earliest cases in other jurisdictions did result in robbery. The conscience of mankind, and also of the courts, protested. Throwing away logic, though still protesting adherence to it, equity sought escape by bringing in the doctrine of "*quantum meruit,*" which had been used by it in some other kinds of cases. Having said these transactions, without regard to their honesty or fairness, were a *fraud,* the new logic says there is so much that is good, beneficent, and meritorious in this *fraud* that the guilty party should be rewarded for it by giving him back his money with interest; which is all he asked or desired in the first instance.

They also applied the doctrine of "rescission of contracts," where unjust and unconscionable results followed the declaring of contracts with corporations void, requiring the corporation to restore what it received by the contract.

They also said that, in many cases, circumstances and facts often of a very trivial character amounted to a ratification of the contract.

PURCHASING CLAIMS AGAINST THE CORPORATION

A director can not purchase claims against his corporation at a discount and enforce them against it at their full value; he can recover only what he paid for them. This is true also as between him and the creditors of an insolvent corporation.[33] But where a minority of the directors, in order to protect their own interests and those of the corporation, purchase claims against it at their full face value, the corporation and stockholders being advised of that fact and given full opportunity to redeem, they may purchase the property of the corporation at execution sale upon a judgment upon such claims. There is nothing in the law "which makes a transaction between a director and his corporation in which the former has a personal interest *ipso facto* void. Such a transaction is subject to rigid scrutiny and is voidable for any fraud or violation of the duties of their trust upon the part of the directors," and the burden of proof is on him who alleges fraud.[34]

A secretary and managing agent can not secretly buy up claims and through them secretly acquire title to the property of the corporation; he will be held to be a trustee for the corporation and upon being reimbursed the amount paid out by him with interest will be compelled to convey the property to the corporation.[35]

But if he really never became a director, *de jure* nor *de facto*, he is not prevented from acquiring title to the corporation's property at a judicial sale.[36]

In a case which was cited as an authority in the Pacific Vinegar Works case, *supra*, the corporation owing a certain sum of money, the directors who owned

[33] Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439; Sullivan v. Triunfo Gold etc. Min. Co., 39 Cal. 459.

[34] Snediker v. Ayers, 146 Cal. 407, 80 Pac. 511.

[35] San Francisco Water Co. v. Pattee, 86 Cal. 623, 25 Pac. 135.

[36] Rozecrans Gold Min. Co. v. Morey, 111 Cal. 114, 43 Pac. 585.

all the stock unanimously resolved that the corporation borrow that sum, and that the president and secretary execute a mortgage on its property securing the loan, the money to be applied to the payment of the debt. Instead of the corporation borrowing the money from other parties, the president purchased the debts, in the name of a partnership firm of which he was a member, and he and the secretary in the presence of all of the directors, as the secretary testifies, which is uncontradicted, executed the notes and mortgage to the partnership securing the same. The court says, "this was clearly unauthorized by the resolution. . . . The position of [the president] as a member of the firm, and his position as trustee and president of the corporation were inconsistent. . . . It was to his interest to buy them [the claims] at as great a discount as possible. The greater the discount the greater the gain. If he succeeded in purchasing the debts at *any* discount, to that extent he secured to himself an advantage not common to all of the stockholders. . . . In this particular case it does not appear that [the president] secured the demands against the corporation at any discount, neither does it appear that he did not. Nor does the policy of the law permit any inquiry into that question." The note and mortgage were excluded as evidence and the judgment of the court below was for the corporation, which judgment was affirmed on appeal.[87]

PURCHASING PROPERTY OF CORPORATION SECRETLY

The conditions underlying a secret purchase of property from the corporation by a director or officer are

[87] Davis v. Rock Creek etc. Min. Co., 55 Cal. 359, 36 Am. Rep. 40. In the quotation from this case in Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 364, 104 Am. St. Rep. 42, 78 Pac. 550, the words from the decision, "secured the demands," last appearing above, are erroneously quoted as "assumed the demands."

fundamentally and widely different from a loan of money by them to the corporation.

The amount of the loan is received by the corporation, and is accurately measured in dollars, but the value of property is often so uncertain that opinions about it differ widely. The rule therefore has grown up that, at the election of the corporation,[38] all such transactions will be set aside. The corporation must restore what it has received by the sale, but if it is unable then to do so the courts declare that the officer took the property in trust for the corporation, and order it sold, and, after reimbursing the officer the amount paid by him to the corporation, direct that the balance be turned over to the corporation. It may be said that every such secret purchase is either an actual or constructive fraud on the corporation.

PURCHASING PROPERTY FOR CORPORATION—SECRET PROFITS

A vice president purchased and secretly held a property which, five days later, he sold to his corporation at a large profit. No director or stockholder had talked with him about the matter until the board meeting which made the purchase, although he used his influence in the board meeting to induce them to buy it. The corporation, electing not to rescind its purchase, sued to recover the secret profits; this it could not do because the court said the purchase five days before was as good as if made at any time, however long, before the corporation purchased.[39] Without doubt, it could have rescinded the purchase.

38 Dundon v. McDonald, 146 Cal. 585, 80 Pac. 1034; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

39 Highland Park Inv. Co. v. List, 27 Cal. App. 761, 151 Pac. 162.

AUTHORITY UNDER BY-LAWS AND RESOLUTIONS

If the by-laws require contracts with reference to real estate to be signed by both the president and secretary, if no different course of business is shown, one signed by the president alone is insufficient, and the unauthorized acceptance of a cash payment by an agent so employed does not estop the corporation from rejecting the contract.[40] Where, however, it was shown that it had been the custom of the president to indorse promissory notes, the corporation was bound;[41] such a by-law is not restrictive or a limitation.

It was also said in the preceding case that a by-law that the president shall have direction of the affairs of the corporation, subject to the advice of the directors, does not enlarge his powers.

A deed to the president of the corporation, executed by the president himself pursuant to a resolution of the board of directors, shows that the president was acting as the instrument of the corporation and is not void as against public policy.[42]

RATIFICATION OF PRESIDENT'S ACTS

A note and mortgage, though properly executed, but invalid because there was no authority in the by-laws or in a resolution of the board of directors, may be ratified by the corporation retaining the benefits of the loan,

40 Black v. Harrison Home Co., 155 Cal. 121-126, 99 Pac. 494; Bliss v. Kaweah Canal etc. Co., 65 Cal. 502, 4 Pac. 507; and the authority of agents must appear, Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105.

41 Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289.

42 Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

with long continued silence and no offer to rescind it;[43] bonds are not invalid for want of power to execute the mortgage;[44] and if the president is authorized to negotiate the bonds, but being unable to do so pledges them for a large sum, which is used by the corporation, and no objection was made for a long time, it was held the corporation by such acquiescence ratified the president's assumed authority to pledge the bonds; but the mortgage must be executed pursuant to a resolution of the board of directors with the consent of two-thirds of the stockholders.[45] If the written report of the president to the board is not full, still the ratification by the board of directors stands, unless it can be shown that they acted upon some mistake of facts.[46]

Where the corporation, with full knowledge of all the facts, imparted to it by its president, accepted and retained the benefits of his acts, it will be estopped from repudiating his acts, although the contract was one required to be in writing and hence could be ratified only in the same manner required for conferring the original authority and it was so defectively executed that acceptance and retention of the benefits would

[43] Curtin v. Salmon River etc. Co., 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851. See, also, Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049, and approving quotations from this case, San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 62-64, 33 L. R. A. 788, 44 Pac. 333, and Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 489, 45 Pac. 809.

[44] Illinois Trust & Sav. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[45] Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Forbes v. San Rafael T. Co., 50 Cal. 340.

[46] Bien v. Bear River etc. Co., 20 Cal. 602, 81 Am. Dec. 132; but an action which is unlawful can not be ratified; Martin v. Zellerbach, 38 Cal. 300, 311, 99 Am. Dec. 365.

not constitute a ratification under the provisions of sections 2309 and 2310 of the Civil Code.[47]

[47] West v. Will C. Prather & Co., 7 Cal. App. 81, 83, 93 Pac. 892; Crowley v. Genesee M. Co., 55 Cal. 273; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; Blood v. La Serena etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532; Greig v. Riordan, 99 Cal. 316-321, 322, 323, 33 Pac. 913. But without referring to this language, although the case was referred to, a very narrow construction was put on these powers in Rigby v. Lowe, 125 Cal. 613, 58 Pac. 153. See, also, Shaver v. Bear River etc. Co., 10 Cal. 396; Mills v. Boyle Min. Co., 132 Cal. 95-98, 64 Pac. 122; see Hamilton v. Bates, 4 Cal. Unrep. 371, 35 Pac. 304. He may make oral contracts to sell saloons, fixtures, etc. A ratification of all the acts of the directors since the preceding stockholders' meeting, where the action of the directors in paying a director for outside services was discussed, was a ratification of such payment, and the presence of the director at the stockholders' meeting does not invalidate the ratification, his vote not being necessary to pass the same, Bassett v. Fairchild, 6 Cal. Unrep. 458, 61 Pac. 791. But if the corporation does not have actual knowledge of the specific contract, there is no ratification or estoppel, Rideout v. National etc. Assn., 14 Cal. App. 349, 112 Pac. 192; see Newhall v. Joseph Levy Bag Co., 19 Cal. App. 9, 124 Pac. 875. The converse of this rule—that is, that an individual contracting with a corporation, having received the benefits thereof, can not be heard to say that the officers of the corporation did not have power to make the contract, L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423, 126 Pac. 187. So, also, as to validity of mechanics' liens for materials furnished at the instance of individual directors and officers, Blanck v. Commonwealth etc. Corp., 19 Cal. App. 720, 721, 127 Pac. 805. Not only does a corporation take a contract made by its president which it has ratified by accepting the benefits thereof, cum onere, but such ratification conclusively proves the authority of the president to bind the corporation, and it can not repudiate the representations of its president, which induced the other party to make the contract, Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 55 Pac. 1062; Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 139 Pac. 91. So in case of the employment of an attorney by the president, Goodwin v. Central Broadway Bldg. Co., 21 Cal. App. 376, 131 Pac. 896. A director-general of a corporation, who employed a performer for one season, has ostensible authority to employ him for the next; a principal can not limit the apparent authority of an agent by private instructions, Eddy v. American etc. Co., 21 Cal. App. 487, 132 Pac. 83.

Where the president of a railroad company employed attorneys, verbally, to act for the company in a suit in which they recovered a large amount of money for the company, which employment and services were known to the directors, who advised with the attorneys in respect to the suit, it was held that these acts amounted to a ratification of the act of the president in employing the attorneys,[48] but probably this should be characterized as estoppel instead of ratification. A subsequent ratification is equivalent to precedent authority, and it is not necessary to plead ratification, for it is involved in the issue whether the instrument was executed by the corporation.[49]

And a ratification of a contract made by the president, when the corporation insists on the enforcement of the contract, if the contract is equally susceptible of two different constructions, carries with it the right to introduce in evidence the conversations between the president and the other party at the time of making the same to determine the intent of the parties. A corporation is presumed to have full notice of all facts known to its president, and the corporation, in accepting a contract, takes it *cum onere*.[50] In a very late case, however, the court has said, even where the evidence

[48] Pixley v. Western Pacific R. Co., 33 Cal. 183, 91 Am. Dec. 623; Goodwin v. Central Broadway Bldg. Co., 21 Cal. App. 376, 131 Pac. 896.

[49] Boggs v. Lakeport etc. Ass'n, 111 Cal. 354-357, 43 Pac. 1106.

[50] Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 55 Pac. 1062; approved and followed on the point that the corporation is presumed to have full knowledge of the acts of its president, Fresno St. R. Co. v. Southern Pacific R. Co., 135 Cal. 202-208, 67 Pac. 773; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 597, 77 Pac. 1113, and cases cited. Contra on ratification, Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105; Blood v. La Serena etc. Co., 113 Cal. 221, 229, 41 Pac. 1017, 45 Pac. 252; see Dickinson v. Zubiate Min. Co., 11 Cal. App. 656, 106 Pac. 123; Bartlett Estate v. Fraser, 11 Cal. App. 373, 105 Pac. 130.

showed that the business of the corporation was transacted by the secretary and the manager, and a contract with the corporation was mutually cancelled by them and the other party to the contract, and the directors were duly informed of that fact but took no action of any kind in regard thereto, that such failure of the directors does not amount to a ratification of the cancellation, and no estoppel was proved.[51] If the president's vote was necessary to carry the resolution of ratification where he is interested, there is no ratification;[52] that it is really a repudiation of the transaction.

A promissory note signed by the president and secretary without the name of the corporation being subscribed thereto or contained in the body of the instrument and without the seal, is good against the corporation, if it be shown that the corporation negotiated the loan and received the proceeds, and expended them for its own use, the directors ratifying the same.[53]

WHERE GENERAL AUTHORITY IS GIVEN

Where a board of directors has authorized its president to make and sign contracts in its name and to do a general business for the corporation, he is authorized to make a lease of premises for the use of the corporation, and it was further held that where the president presented what purported to be a resolution of the board of directors authorizing him to make the lease, although no such resolution had been passed, the corporation was bound by his representations.[54] A reso-

51 Blair v. Brownstone Oil etc. Co., 168 Cal. 632, 143 Pac. 1022.

52 Chamberlain v. Pacific Woolgrowing Co., 54 Cal. 103.

53 San Joaquin Valley Bank v. Gate City etc. Co., 170 Cal. 250, 149 Pac. 557.

54 Hawley v. Gray Bros. etc. Pav. Co., 106 Cal. 337, 39 Pac. 609. A resolution authorizing the president to act with reference to street work authorizes him to contract with the city for the improvement of the street, Oakland Paving Co. v. Rier, 52 Cal. 270.

lution of the directors authorizing the president or other agent of the corporation to incur indebtedness, negotiate loans, etc., gave the president power to execute the notes of a corporation, and a by-law providing that notes signed by the president and secretary shall be binding on the corporation does not make it necessary that the secretary should also sign the notes to make them binding on the corporation.[55]

Where a corporation is engaged in the business of buying and selling machinery, and its by-laws authorize the president to transact its ordinary business without consulting the directors, the president has authority to buy machinery for the corporation, and to buy the same on credit, and to give its promissory note therefor.[56]

But if a president, having ostensible authority to sell goods on credit, though actually authorized to sell only a limited amount, exceeds his authority by so selling a greater quantity, he is liable to the corporation for the loss, if any. The corporation does not ratify the transaction, so far as the president is concerned, by receiving part payment on such sales, because it could not disaffirm the sales so far as the purchasers were concerned. Nor are entries on the books of the corporation notice to the corporation of the facts entered, as between itself and any of its officers and agents. Ratification applies only as to third persons, or to an agent or officer, when the corporation could have disaffirmed or rescinded the contract and, having complete knowledge of the facts, failed to do so.[57]

A resolution "that the president make all necessary arrangements for paying off the debt by giving a mortgage, or any other means," is sufficient authority

55 McCormick v. Stockton etc. R. Co., 130 Cal. 100, 62 Pac. 267.

56 Siebe v. Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14.

57 Pacific Vinegar etc. Works v. Smith, (second appeal) 152 Cal. 507, 93 Pac. 85.

for the president executing a mortgage on the corporation's property for that purpose.[58] In this case the resolution was not recorded, but it was held that its passage and contents could be proved by parol. Another interesting question, which has been not a little debated, was decided; it being held that the rough draft of the minutes of the meeting made during the meeting is not original evidence, and is as much secondary evidence of what was done at the meeting as oral testimony, and that the records of the corporation are the best evidence. Where the management of the affairs of a corporation is conferred upon the president, he may execute an agreement not to plead the statute of limitations, in consideration of an agreement not to sue for a stated period.[59]

Where a president has been given such general powers, and the company is authorized to deal in real estate, he has power to make contracts for the purchase and sale of real estate, and whether a contract is "essential" to the transaction of the corporation's ordinary affairs is to be determined by the corporation or its managers; if it is within the apparent scope of its organization, the fact that the contract has been entered into by the corporation or its representative is a determination on the part of the corporation that it is essential.[60] Under general powers making him a general manager he may sign a protest against a street improvement, and it does not matter that he does not sign as general manager, but as president.[61]

58 Boggs v. Lakeport etc. Ass'n, 111 Cal. 354, 43 Pac. 1106.

59 Wells Fargo & Co. v. Enright, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

60 Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855; Pettibone v. Lake View etc. Co., 134 Cal. 227, 66 Pac. 218.

61 Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 535; same as to the manner of signature, Wells Fargo & Co. v. Enright, 127 Cal. 669-672, 49 L. R. A. 647, 60 Pac. 439.

SECRETARY

An agreement by the promoters of a corporation that the corporation to be organized shall employ a party as secretary is not enforceable against the corporation, when organized, unless it ratifies that agreement.[62]

Where it was the duty of the secretary or directors to call a meeting of the stockholders for the annual meeting of directors, and they refused to do so, the court appointed a special officer and commissioner to do so, and the election held pursuant to this special officer's call was held to be valid for all purposes.[63]

If no particular person is designated by the statutes for the execution of documents, making affidavits, etc., they may be made by any one of its officers or agents in its behalf, and the declaration of the secretary that he is such is sufficient proof to satisfy the law in that particular.[64]

The fact that a person is secretary of a corporation is not sufficient alone to establish his authority to make contracts for the corporation; indeed, the secretary's duties are generally of quite a different character. In the absence of special authority he has no power to execute notes or to employ laborers about a mining company's property.[65] Nor does he have power to

62 Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834.

63 Potomac Oil Co. v. Dye, 14 Cal. App. 674, 113 Pac. 126, 130.

64 Old Settler's Inv. Co. v. White, 158 Cal. 236, 246, 110 Pac. 922, and cases cited; Southern Pacific Mill. Co. v. Superior Court, 14 Cal. App. 240, 242, 111 Pac. 625.

65 Danaldson v. Orchard Crude Oil Co., 6 Cal. App. 641, 92 Pac. 1046; Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; Beeman v. Lovett, 46 Cal. 387; or to cancel contracts, Blair v. Brownstone Oil etc. Co., 168 Cal. 632, 143 Pac. 1022; but a treasurer's endorsement of a note conveyed prima facie title to the holder, Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal. App. 81, 92, 118 Pac. 785, 789.

release or transfer property of the corporation,[66] nor does the fact that the secretary represented the corporation in transactions which led to the execution of a promissory note constitute him the ostensible agent of the corporation to bind it by signing a composition agreement concerning the note.[67] But if he has been in the habit of signing warehouse receipts to himself, with the knowledge of the corporation, his acts will bind the corporation.[68]

There is no presumption that the secretary had power to assign a chose in action; his power to do so must be shown;[69] but where it is shown by testimony that the secretary and general manager had a general authority to assign claims for collection, it was not necessary that a special resolution be adopted authorizing him to do so.[70]

When a resolution of the directors authorizing the secretary to make a loan for the corporation was actually passed, according to the testimony, but it was not reduced to writing, it is sufficient to sustain an action to recover the amount of the loan.[71]

66 California Winemakers' Corp. v. Sciaroni, 139 Cal. 277, 72 Pac. 990.

67 Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613.

68 Riley v. Loma Vista Ranch Co., 1 Cal. App. 488, 82 Pac. 686; see Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817; Kelly v. Ning Yung etc. Ass'n, 2 Cal. App. 460, 84 Pac. 321.

69 Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435. Without such authority the assignment was not a corporate act, Chandler v. Robinett, 21 Cal. App. 333, 131 Pac. 891.

70 Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445; see Rigby v. Lowe, 125 Cal. 613, 58 Pac. 153; Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328.

71 Bank of Yolo v. Weaver, 3 Cal. Unrep. 569, 31 Pac. 160, and so do his contracts where he has been in the habit of making such contracts as were sued on in this case, Eells v. Gray Bros. etc. Co., 13 Cal. App. 33, 108 Pac. 735.

And if the conduct of the whole business of the corporation was practically left to the secretary, his statements and acts in reference to the same bind the company.[72]

In the case of a religious corporation it was held not only that the secretary had no power to bind the corporation by contracts made by him, but it was not bound by receipt of the benefits when there were really no benefits, the work being worthless.[73]

If the secretary takes a non-negotiable note in payment for shares of the corporation's stock, with a verbal agreement that the note should be payable only upon a certain condition, and the issuance of the stock and the acceptance of the note were expressly ratified by the board of directors, it must be presumed that the secretary, upon delivering the note to the corporation, notified it of the conditions of payment; the condition not happening, the note was without consideration.[74]

The same rules as to the effect of the ostensible authority of the secretary when he is constantly engaged in the conduct and management of the corporation's affairs, and of ratification of his acts by accepting the benefits of them, apply to his acts as to other officers.[75]

Where a new secretary is appointed without any express agreement as to the amount of his salary, no presumption arises that he should have the same salary as the former secretary; in such a case he can recover the reasonable value of the services.[76]

72 Abbott v. 76 Land & Water Co., 87 Cal. 323-328, 25 Pac. 693.

73 Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 Pac. 838.

74 Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638; but see "Fictitious Stock" and "Subscriptions for Stock."

75 A. Meister & Sons Co. v. Wood & Tatum Co., 26 Cal. App. 584, 147 Pac. 981.

76 Carver v. San Joaquin Cigar Co., 16 Cal. App. 572, 118 Pac. 91.

But if one is induced to purchase stock on the promise of a stated salary, no length of time being specified, the arrangement contemplates a reasonable time, and if the purchaser is soon discharged he may recover back the money he paid for the stock.[77]

GENERAL MANAGER

The general manager, even if *de facto* only, may make contracts for the employment of persons for the corporation, and where the majority of the directors of the corporation, individually, had knowledge of the facts and they did not disaffirm it, it was not necessary, in order to bind the company, that the employment should be ratified at a regular meeting of the board.[78]

Where the by-laws of a corporation define the powers and duties of a general manager, they become a part of his contract of employment and measure both,[79] but this was a case between the general manager and the corporation, not involving the rights of third parties. The manager of a trust company, foreclosing a mortgage, may appoint the auctioneer to conduct the sale; it is not necessary that the auctioneer be appointed by a resolution of the board of directors.[80] But a manager of a ditch company was held to very limited power in construction or repair work,[81] and it was held that the

77 Brown v. National Electric Works, 168 Cal. 336, 143 Pac. 606.

78 Brown v. Crown Gold etc. Co., 150 Cal. 376-387, 89 Pac. 86. In case of the president and secretary, see Hudson v. Seeley Specialties Co., 19 Cal. App. 213, 216, 124 Pac. 1051; and in case of a secretary and bookkeeper, see Allen v. Central Counties etc. Co., 21 Cal. App. 163, 131 Pac. 78; nor does the fact that the secretary was a stockholder make any difference, and of the president, Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

79 San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 79-82, 53 Pac. 410.

80 Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

81 Centerville etc. Ditch Co. v. Sanger etc. Co., 140 Cal. 385, 73 Pac. 1079.

local manager of a foreign corporation, being given power to collect a dishonored check, did not have power to assign the check to another person for collection.[82]

But if the powers conferred upon the general manager are general, he has power to assign the choses in action of a corporation to its creditors, either in payment of or as security for the debts of the corporation.[83]

The agreement of a general agent of a corporation who purchases property from a party who owes a part of the purchase price thereof that the corporation would see that the original vendor paid the balance of purchase money due him is binding on the corporation; this promise of the corporation was original and not collateral, and not within the statute of frauds.[84]

OFFICERS AND AGENTS

In the nature of things corporations can act only through representatives. The method of appointing or choosing directors, and to some extent of officers, is expressly provided in other sections of the Civil Code, and may be governed to some extent by the by-laws. Corporations may appoint agents to the same extent as natural persons, unless limited in their charters, and such appointment need not be by deed or resolution, unless the charter or by-laws so require.[85] The appoint-

82 Rigby v. Lowe, 125 Cal. 613, 58 Pac. 153.

83 McKiernan v. Lenzen, 56 Cal. 61; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Preston v. Central California etc. Irr. Co., 11 Cal. App. 190, 201, 104 Pac. 462.

84 Tevis v. Savage, 130 Cal. 411, 62 Pac. 611.

85 Carey v. Philadelphia etc. Co., 33 Cal. 694, 695; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 Pac. 738. And as to cashiers habitually transacting business for a bank out of the usual, the rule is the same, Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Pacific Bank v. Stone, 121 Cal. 202-208, 53 Pac. 634; Nicholson v. Randall Banking Co., 130 Cal. 533, 539, 62 Pac. 930; Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

ment of agents for the transaction of and carrying on of the ordinary business may be inferred from the admitted relation of the agent to the corporation or from its course of business, as has already been said.[86] They have been called *de facto* agents or employees.[87]

Corporations are bound by the acts of their agents to the same extent as natural persons; the rule that what one does by another he does himself applies to corporations the same as to individuals.[88]

The officers of a corporation may, by their acts, estop a corporation from denying that it dedicated land for a street to the public,[89] and the admissions of the president and managing agent in regard to the fulfillment of contracts are evidence against the corporation.[90]

Where an agent selling merchandise or articles for a corporation takes notes in payment therefor, payable to the agent, and indorses them with the name of the corporation and sells them without the knowledge or authority of the corporation, and reports the sales as for cash and remits the amount to the corporation, the latter is not liable as an indorser upon the notes and is not estopped from disputing the agent's authority to indorse the paper.[91]

86 Crowley v. Genesee Min. Co., 55 Cal. 273; Streeten v. Robinson, 102 Cal. 542, 36 Pac. 946; Bates v. Coronado Beach Co., 109 Cal. 160, 163, 41 Pac. 855; Newhall v. Joseph Levy Bag Co., 19 Cal. App. 9, 25, 124 Pac. 875; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 251, 123 Pac. 212; Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679.

87 Brown v. Crown Gold etc. Co., 150 Cal. 376-386, 89 Pac. 86; Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177.

88 McKiernan v. Lenzen, 56 Cal. 61; Andres v. Fry, 113 Cal. 124, 45 Pac. 534.

89 Sussman v. San Luis Obispo, 126 Cal. 536, 59 Pac. 24.

90 Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609, 31 Pac. 367.

91 Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18, 82 Pac. 1124.

A corporation is liable for acts done by its agents *in delicto* as well as *ex contractu* in the course of its business and their employment, to the same extent as an individual would be under like circumstances,[92] such as libel; but exemplary damages can not be awarded unless the corporation directed the wrongs to be done, or ratified them.[93] But it is not liable for a trespass committed by the stockholders before the incorporation,[94] nor is it estopped to deny the validity of an unauthorized act of its agent when it has derived no benefit from it nor ratified it.[95] But stockholders can not avoid responsibility for the unauthorized acts of the directors by abstaining from inquiry into the affairs of the company or absenting themselves from meetings.[96]

The authority of an agent of the corporation to make a contract for it may be inferred from the general course of business and from his admitted relations to the company,[97] but where the acts are not such as are usually exercised by the officers as a part of the ordinary business of the corporation, there is no presumption that such acts done by the officers are within their powers.[98] The giving of a personal note by the agent

92 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

93 Trabing v. California Nav. etc. Co., 121 Cal. 137, 143, 53 Pac. 644.

94 Berry v. San Francisco etc. R. Co., 50 Cal. 435.

95 Bliss v. Kaweah etc. Co., 65 Cal. 502, 4 Pac. 507; Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981.

96 Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049; see Civil Code, sec. 309, and cases thereunder.

97 Crowley v. Genesee Min. Co., 55 Cal. 273; Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Allen v. Central Counties Land Co., 21 Cal. App. 163, 166, 131 Pac. 78; Johnston v. Tejunga Rock Co., 25 Cal. App. 84, 142 Pac. 907.

98 Mulligan v. Smith, 59 Cal. 206-225; see Neuhart v. George K. Porter Co., 23 Cal. App. 526, 138 Pac. 951.

in the purchase of property is not conclusive evidence that the agent was acting in his own personal interest.[99]

In the case[100] of a foreign corporation, doing practically all its business in this state, where a general manager for the first year was named in the Articles of Incorporation, under a law which required the Articles to state "by what officers the affairs of the corporation are to be conducted and the time at which they are to be elected," the by-laws subsequently adopted making no provision for a general manager, it was held that a contract of this general manager bound the corporation. The decision rested upon the ground that he was named or appointed in the Articles, which seems wholly insufficient, for there was no statute, and hence no power to name the individual in the Articles; and under the common law the stockholders only can elect the directors. It was sufficient that he was a *de facto* officer. Under our statute the directors, but no one else, may be named in the Articles; appointing the president or officers in the Articles never makes them *de jure* officers, although they may become *de facto* officers by actually exercising the functions of the respective offices.

OFFICERS TURNING OVER FUNDS

If it was the duty of the secretary to receive funds of the corporation and to turn them over to the treasurer promptly, and he did not do so promptly and the moneys were stolen from him, he is liable therefor to the corporation;[101] and if a manager of a corporation has been proved guilty of embezzlement, through the

99 Lake Shore Cattle Co. v. Modoc Land etc. Co., 130 Cal. 669, 63 Pac. 72.

100 Smith v. Sinbad Dev. Co., 11 Cal. App. 253, 104 Pac. 706.

101 Odd Fellows' Mut. Aid Ass'n v. James, 63 Cal. 598, 49 Am. Rep. 107.

connivance of bookkeepers, he is liable for the total loss sustained, unless he can prove that the other losses were not sustained through any fault of his,[102] and especially is this so if he has charge of the bookkeepers.

SELLING PROPERTY AT GROSSLY INADEQUATE PRICE A FRAUD

If directors, for the purpose of defrauding stockholders, sell property for a grossly inadequate price (such as at one-tenth of its value), they commit a fraud, and if the directors are the implements or representatives of the purchasers, the purchasers are participants in the fraud. Inadequacy of price does not ordinarily raise any presumption of fraud, but this is not a rule where the relations of a party to the transaction are fiduciary and those who benefit by it control the party occupying that position.[103]

APPOINTING SUBORDINATE OFFICERS

Where the by-laws provide for sundry officers, including a general manager and a superintendent, and that they shall be elected and their salaries be fixed by the directors, the general manager has no power to appoint a superintendent or to fix his salary. If he does so, however, and the corporation has knowledge of the fact and without objection accepts the services of the superintendent, but has no knowledge of the amount of the salary agreed upon with the general manager, the corporation is not liable for the salary so fixed, but is liable for a *quantum meruit* for the services performed. It was also said that the provisions of section 2311 of the Civil Code, that "ratification of a part of an indivisible transaction is a ratification of the whole," has no application to such a transaction and

102 San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 87, 53 Pac. 410.

103 Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

state of facts as this.[104] Where the president has authority to sell its treasury stock he may employ brokers to do so and if they make a sale they are entitled to commissions, and if the corporation suffers appearances to exist, and its officers and agents to so act, as to give persons reason to believe they have authority to act, the corporation is liable.[105]

REMOVAL OF OFFICERS AND AGENTS

Agents, such as those who may be entrusted with power to collect and invest subscriptions to stock, having no interest coupled with their agency, may be removed at any time by the corporation and other agents be appointed for that purpose, or the corporation itself may assume the functions of the agents removed.[106] It is both asserted and denied that the corporation, in the absence of any provision in the charter empowering it to do so, has the power of amotion as to its officers, but it has been decided in this state in the case of a city, if there is such power conferred in its charter, that it has power to do so.[107] Section 310 of the Civil Code (which see) expressly gives this power to the stockholders in the case of directors, and section 315 of the Civil Code gives the courts power to do so in case of an illegal election.

LIABILITY ON CORPORATION NOTES

An agent or officer who makes and signs the corporation notes, but without any authority to do so, is not

104 Colpe v. Jubilee Min. Co., 2 Cal. App. 393, 84 Pac. 324.

105 Henderson v. Western Gas Engine Co., 8 Cal. App. 247, 96 Pac. 787.

106 San Joaquin Land etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

107 Croly v. Board of Trustees of Sacramento, 119 Cal. 229, 234, 51 Pac. 323.

liable personally on the notes, if he does not use apt words to charge himself. It is intimated, however, that he may be liable for the wrong done,[108] and this is true if the supposed corporation proves to be no corporation.[109] In this case it was held that a note stating "we as trustees," etc., and signed by the individuals under which was written "Trustees of," etc., that the individuals were not personally bound. So, also, a note signed "P., president, S. T. R. R. Co.," binds the corporation.[110] A note signed "C., president Pac. Peat Coal Co. T., sec. *pro tem*," is the note of the corporation.[111] But where the note reads "I promise to pay" and is signed "S., President Pacific Woolgrowing Co.," it was held that the latter words were merely descriptive of the person, and that the note bound S. only, and was his personal obligation.[112] And a president of a corporation signing a note, really executed on account of corporation business, "A. Hassett, President," makes himself personally liable.[113] The question of the liability of the corporation, also, did not arise in this case. The decisions of the several states are in great confusion and conflict in cases of this character; the safest way is for the corporation name only to be signed to the note, followed by the words "by A. B., president."[114]

108 Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; cited in Wallace v. Bentley, 77 Cal. 19, 21, 11 Am. St. Rep. 231, 18 Pac. 788, and Melone v. Ruffino, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93.

109 Blanchard v. Kaull, 44 Cal. 440.

110 McCormick v. Stockton etc. R. Co., 130 Cal. 100, 62 Pac. 267.

111 Farmers' etc. Bank v. Colby, 64 Cal. 352, 28 Pac. 118.

112 Chamberlain v. Pacific Woolgrowing Co., 54 Cal. 103, 106.

113 Hobson v. Hassett, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320.

114 Bean v. Pioneer Min. Co., 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86.

In another case[115] the mortgage was signed by A., B., C., and D., president, directors, and members of the (naming the corporation), and concluded "in witness whereof the said parties of the first part hereunto set their hands and affix their seals," and the seals were the personal seals of the parties signing. The bond which the mortgage was made to secure was signed in the same manner and contained no mention of the corporation. It was held that neither the note nor mortgage bound the corporation.

On the other hand, the fact that the superintendent, who conducted all the ordinary business of the corporation with outsiders, gave his personal note in payment for property purchased is not conclusive against the liability of the corporation on the note.[116]

While apparently recognizing the binding force of those peculiar cases,[117] which seem to recognize the claim where one person owns all, or substantially all, of the stock of a corporation and dominates its policy, that he is personally bound on all contracts which he makes as a representative of the corporation, the court held that such a person, being the president, was not personally bound on a contract with an attorney in regard to attorney's fees, where the attorney, having full knowledge of such ownership, accepted the obligation of the corporation alone.[118] It was also said that neither would the misrepresentations by the president of the corporation's profits, upon which payment of the attorney's fees was dependent, make the president

115 Richardson v. Scott River etc. Min. Co., 22 Cal. 150, 156. See, also, Love v. Sierra Nevada etc. Min. Co., 32 Cal. 639, 91 Am. Dec. 602, where a mortgage defectively executed in a somewhat similar manner was enforced as an agreement to mortgage.

116 Lake Shore Cattle Co. v. Modoc Land etc. Co., 130 Cal. 669, 63 Pac. 72.

117 See, ante, cases noted under Civil Code, sec. 305.

118 Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918.

liable for their payment; nor would signing the contract officially and personally "as stockholder," and that parol evidence was admissible to show that it was not the intention of the president to bind himself personally.

VERBAL AGREEMENT AS TO ELECTION OF PRESIDENT

A verbal agreement among stockholders that a stockholder lending the corporation money shall be president for a period can not be specifically enforced.[119] In this case there was no agreement that he should be elected a director, nor were any proxies given. At the election the proposed president was not elected a director, and not being a director he could not be president. The court said, in the absence of an agreement upon a valuable consideration, the court can not compel the stockholder to give a proxy. But there was an agreement and a valuable consideration; there is no statute requiring such an agreement to be in writing, although the proxy must be in writing. But this question did not really arise in the case, no order for the issuance of a proxy being asked; the proceeding was one to set aside an election on the above statement of facts (see subject, "Election Disputes," under Civil Code, section 315), which, we think, established a fraud. These agreements are very common in the management of corporations, but we do not find any other cases where this question has arisen.

AGENCY TO SELL REAL ESTATE

The authority of an agent to sell land must be in writing and a corporation can confer authority upon agents for this purpose only through its board of directors by resolution duly passed and recorded, and a ratification

119 Dulin v. Pacific Wood etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

of such authority can be made only in the same manner.[120] This is unquestionable law, but the case went much further, saying that the corporation retaining the part payment made on a contract for sale of some of its lands made by agents without such authority, and suing for the balance, was not a ratification of the contract, and as they were not estopped from disaffirming it neither was the other party, and therefore the other party could sue to recover back the money paid by him. While the corporation could have disaffirmed the contract at any time before they affirmed it (clearly suing for the remainder was affirming it), and although possibly that act did not come within the requirements of the code as to ratification, certainly the corporation was thereafter estopped to disaffirm it. In a later case,[121] while not referring to or commenting on this case, it was held that where a contract (a promissory note) was executed without authority, but the corporation retained the benefits and did not offer to rescind, it was estopped to plead want of authority in the person who signed the note. So far as the doctrine of estoppel is concerned there is no difference in the cases.

EXECUTIVE COMMITTEE

The appointment of an executive committee to attend to all of the business which usually comes before the board of directors, in the intervals between the meetings of the board, has become very common. In fact, the business of some corporations is so great as otherwise to require the board to be in almost constant

120 Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105. This case was cited but on quite different states of facts in Delano v. Jacoby, 96 Cal. 275, 281, 31 Am. St. Rep. 201, 31 Pac. 290; Blood v. La Serena Land etc. Co., 113 Cal. 221, 229, 41 Pac. 1017, 45 Pac. 252; Nason v. Lingle, 143 Cal. 363, 366, 77 Pac. 71.

121 Curtin v. Salmon River etc. Co., 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851.

session. The laws of many states provide for the creation of such a committee, and in New Jersey, Delaware, and Nevada such a committee is usually provided for in the general clauses concerning the government of the corporation, which the statutes of those states authorize to be inserted in the Articles of Incorporation. It is doubtful, in California, whether such a provision in the by-laws would be legal. If all action by an executive committee must come before the board of directors for approval or ratification, the committee is of little, if any, practical value.

There is no statute on the subject in this state, nor can any provisions for regulating or conducting the business of the corporation be inserted in the Articles, as in New Jersey and the other states named.

The existence of an executive committee has come before our supreme court but three times, and once before the district court of appeal, so far as we have discovered, and then not in a way which settled its character, status, or powers. Its legality seemed to be taken for granted; but in one instance the case presented really no powers at all, for its action was "under the general direction of the board of directors," and nothing was stated as to what it could do.[122]

In another case this committee was authorized by the board of directors to do a certain thing which they did, and their action was held legal; but this was simply the creation of a special agency; the same power might have been given to any one not connected with the corporation in any manner.[123] The other was an execu-

122 Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613. Another case was Horton v. Remillard Brick Co., 170 Cal. 384, 149 Pac. 813.

123 Andres v. Fry, 113 Cal. 124, 45 Pac. 534.

tive committee of a bank with considerable powers, but there was no discussion of its legality or powers.[124]

In a case of a New Jersey corporation (where the law expressly provides for the appointment of an executive committee) the action of the executive committee in indorsing a promissory note, the corporation receiving the proceeds, was declared to be binding on the corporation.[125]

OFFICERS CHARGED WITH NOTICE OF CUSTOMS AND USAGES

The officers and directors of a corporation are charged with notice of the customs and usages of the corporation; this was so decided on questions in regard to compensation for their services.[126] See "Compensation of Officers," under section 303, Civil Code.

124 Chetwood v. California Nat'l Bank, 113 Cal. 414, 45 Pac. 704.

125 Tilden v. Goldy Machine Co., 9 Cal. App. 9, 98 Pac. 39.

126 Fraylor v. Sonora Min. Co., 17 Cal. 594; McCarthy v. Mt. Tecarte Land & W. Co., 111 Cal. 328, 338, 43 Pac. 956.

CHAPTER XIV.

CERTIFICATES OF STOCK

Section 323 of the Civil Code is as follows:

> **§ 323.** All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate issued prior to full payment must show on its face what amount has been paid thereon.
>
> All certificates of stock issued by corporations authorized by their Articles of Incorporation to issue stocks of different classes, shall express upon their face the character of stock represented by said certificates.
>
> The said certificates shall also state the number of shares of stock of each class which said corporation is authorized to issue, and the said certificates shall also contain a statement of the nature and extent of the preference granted to the preferred stock. (Amended March 18, 1907; Stats. 1907, p. 348.)

The last two sentences of this section were added by the amendment of 1907 to provide different kinds of certificates for common and preferred stocks. The clause "but any certificate issued prior to full payment must show on its face what amount has been paid thereon" was added in 1905.

The actual issuance of a certificate of stock is not necessary to create the property right in the shares. Nor will an informality in a certificate accepted by the stockholder relieve him from the obligation to pay the

same,[1] nor does any duty devolve upon the purchaser of stock to see that not only his name, but the names of all other purchasers, together with the number of shares owned by them, respectively, are entered on the corporate books; failure of the corporation to perform such duty can not be imputed to the stockholder.[2] It may exist without any certificate;[3] and a corporation may give credit for its stock as well as for any other property sold by it,[3] but it is not bound to issue the certificate until the subscription price is paid in full.[4] The cancellation of an unissued certificate (being made out erroneously as to the name) is not a cancellation of the subscription, nor could the subscription be cancelled without the unanimous consent of all the stockholders; the subscriber is still liable to the corporation and its creditors.[5]

A certificate, however informal, even if it shows unpaid installments due at a future time, is sufficient, under a proper provision in its by-laws, and vests the title to the shares in the party named therein. The corporation not having possession of the certificate has no lien upon it for unpaid balances, and the corporation has no general lien upon the stock certificate,

1 Ferrochem v. Danziger, 23 Cal. App. 584, 138 Pac. 966.

2 Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 27, 108 Pac. 871.

3 Mitchell v. Beckman, 64 Cal. 117-121, 28 Pac. 110; California Southern Hotel Co. v. Callender, 94 Cal. 120-127, 28 Am. St. Rep. 99, 29 Pac. 859; Pacific Fruit Co. v. Coon, 107 Cal. 447-452, 40 Pac. 542; Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600-602, 23 Pac. 134; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70-79, 35 Pac. 349; Garretson v. Pacific etc. Oil Co., 146 Cal. 184-188, 79 Pac. 838.

4 California Southern Hotel Co. v. Callender, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. 859.

5 Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

independent of possession;[6] it may have a lien on the shares, but not on the certificate so as to prevent a transfer.[7] Such a lien may be created by contract between the corporation and its stockholders[8] by inserting apt provisions in the stock certificate. A certificate signed by *de facto* officers is valid.[9]

The above section of the Civil Code makes it imperative that a stock certificate issue when it is fully paid, but it authorizes the creation of a by-law for issuing certificates before full payment. And as between the stockholders and the corporation it may issue certificates as fully paid for less than par.[10] While the unanimous consent of stockholders can not cure the illegality of stock issued in violation of law, yet three years' acquiescence by stockholders estops them from raising any objection, short of positive violation of law. But this rule will not obtain against creditors of the corporation because the unpaid balance of the par value of stock or subscriptions is a trust fund for the benefit of creditors.[11]

The statute of limitation on a suit against the corporation for specific performance of its duty to deliver

6 Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134; Craig v. Hesperia Land etc. Co., 113 Cal. 7-12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

7 Craig v. Hesperia etc. Co., 113 Cal. 7-12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

8 Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852.

9 Sherwood v. Wallin, 154 Cal. 735-740, 99 Pac. 191.

10 Green v. Abietine Medical Co., 96 Cal. 322-330, 31 Pac. 100; Smith v. Martin, 135 Cal. 247, 67 Pac. 779; Turner v. Fidelity Loan Concern, 2 Cal. App. 122-131, 83 Pac. 62, 70; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-67, 97 Pac. 1.

11 Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579-585, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Union Savings Bank v. Leiter, 145 Cal. 696-702, 79 Pac. 441; Turner v. Fidelity Loan Concern, 2 Cal. App. 122-131, 83 Pac. 62, 70; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-67, 97 Pac. 1.

a certificate for the shares is four years, and the same period, after a repudiation of a trust, in effect a "pool," under which the corporation held the stock, bars a suit for the stock.[12]

All such shares remain, however, assessable by the corporation equally for corporation purposes, the same as if fully paid, but while the corporation can not sue the stockholders for the difference between par and the amount paid, creditors may do so.[13]

Stock certificates are not negotiable instruments[14] in the same manner as commercial paper within the definition of sections 3087 to 3095 of the Civil Code, so that a *bona fide* holder takes them discharged of all equities existing between the original owner and the corporation. Many other states give them something of this character between all parties, not including the corporation, but this state does not. The purchaser of a stock certificate is liable to an assessment to pay up to par on the same, as was the original party who received the same, who is released by the transfer on the books of the corporation, and this though there was nothing on its face to indicate that it was not fully paid and though he bought it in open market through a regular stock exchange.[15] The only action which the

12 Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

13 Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809, and cases cited in the foregoing notes.

14 Graves v. Mono Lake etc. Mining Co., 81 Cal. 303-325, 22 Pac. 665; Barstow v. Savage Min. Co., 64 Cal. 388, 391, 49 Am. Rep. 705, 1 Pac. 349; Sherwood v. Meadow Valley Min. Co., 50 Cal. 412; Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711.

15 Perkins v. Cowles, 157 Cal. 625-631, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 72, 97 Pac. 1; Craig v. Hesperia Land etc. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; People's Home Sav. Bk. v. Sadler, 1 Cal. App. 189-195, 81 Pac. 1029.

purchasers have for misrepresentations as to full payment is against the parties making them for damages, or for a rescission of the purchase.

What will be the effect of the amendment of 1905, quoted above, requiring stock certificates which are not fully paid to show on their face how much has been paid thereon is uncertain. No case has yet arisen in which the effect of that clause has been declared; two of the latest cases, though decided after the amendment was made, expressly state that the rights considered were on certificates issued long before, and that the provision of this amendment did not therefore affect them. The principles announced in the Perkins and O'Dea cases, cited above, make it doubtful whether the purchaser of a certificate which did not contain any statements of how much had been paid on it would be protected against proceedings to compel him to pay the same up to par, even since the code section has been put in its present form. Without reference to either of these cases, in a very late case,[16] the court said that no inference will be drawn that shares are not fully paid because the certificates contained no statement as to that fact. Nor was any reference made to the provision of the above section of the code on that subject; in such a case, the effect of that section ought to raise the presumption of full payment.

Would the failure of the officers issuing it to make such a statement, or a false or erroneous statement on the certificate that it was fully paid, bind the corporation? Or rather would it prevent other stockholders from asserting the truth, and claiming that those shares should be paid up equally with their own before their shares could be assessed by the corporation? Would the officers, making an error in that respect, be

[16] Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166.

pecuniarily liable to the corporation? And would the stockholder be compelled to look to the officers for reimbursement for his loss? These and other questions suggest themselves, and how they will be determined can not be foreseen. It is reasonable, and we think just, that the purchaser of such a certificate should be protected, at least so far as the corporation is concerned. The case might be different as to creditors of the corporation. The great growth of the business of the county, and as a consequence the great increase in the number of corporations and the stocks handled in the markets and passing from hand to hand among the people, make it more and more necessary that rules analogous to those governing commercial paper should apply to stock certificates. This, we believe, will be the final result. It is practically the law in many of the states already.

COMMON AND PREFERRED

The statute requires the certificates to state on their face, when both common and preferred stocks are provided for, whether the stock contained in the certificates is common or preferred.

Also all the certificates shall state the number of shares of each kind of stock, and although the statute does not expressly so declare, naturally the par value of the shares.

This section provides that the certificates shall also contain a statement of the nature and extent of the preference granted to the preferred stock. As this language is not limited to the certificates for preferred shares, this statement is probably required to be printed on the certificates for the common shares as well as on the preferred shares, although we do not know of any other state making a requirement that such a statement must be printed on the certificates for

the common shares. The consequences of a failure to do so are not declared, and they are not easy to foresee; clearly the holder of such a certificate would not lose his rights under the Articles, by-laws, and the law, whatever they might otherwise be, for to do so would be to obliterate all the stockholders and thus destroy the corporation.

HOW TRANSFERRED, ETC.

Section 324 of the Civil Code is as follows:

§ 324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property,

And may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate;

But such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer;

WATER COMPANY STOCKS

Provided, however, that any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be so sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto.

PENALTY FOR REFUSAL TO TRANSFER

Whenever any officer of any corporation shall refuse to make entries upon the books thereof, or to transfer stock therein, or to issue a certificate or certificates therefor to the transferee as provided by this and the next preceding section, such officer shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved. (Amended March 22, 1907; Stats. 1907, p. 854.)

PERSONAL PROPERTY

Shares of stock are personal property, and were so held long prior to the enactment of this statute; the statute was merely declaratory of the law as it already existed. But shares of stock and certificates of stock in this state have been buffeted about by ill-fitting definitions, and exposed to all the perils of abstract reasoning concerning their inherent nature, and have never been considered in the light of experience or scientific observation. Or, to put it in another way, necessity and metaphysics have been harnessed together with the usual result of mismated teams.

It has been said that the stock certificate is not only not the stock, nor does it embody the stock, but at most it is in a very limited sense only evidence of the ownership of the stock, and further that it is not the best evidence, for of that fact the books of the corporation are the primary and best evidence. The reasoning has been further refined by saying that even the stock itself is nothing substantive; that it is only a "chose in action," really without form and a void; simply a privilege to demand a thing. This process of reasoning is progressive, for, the viewpoint changing, the shares themselves are transformed from the chose in action into evidence only of the chose in action.

So it was said (with a little more reason) that a promissory note is not the debt, but only the evidence of the debt. But the necessities of business were such that possessing the evidence of the debt was, in many cases, possession of the debt, and promissory notes became themselves property.

Reasoning from these premises, a *situs* was early given to shares of stock, without regard to the location of the certificate or the residence of the owner; that *situs* was said to be at the principal office of the corporation in the state which created it, and, as a consequence, that they could be proceeded against or seized only in that state. This often resulted in a practical defeat or denial of justice. In the effort to steer clear of this logical rock, our court declared[17] that the shares of stock, even of a foreign corporation doing business in this state, owned by a non-resident of the state, could be seized by the courts of this state by serving the absent owner by publication only, thus escaping the rock but falling into the whirlpool of difficulties and conflicts of jurisdictions, and in doing so overturning other principles.

The effort to separate such certificates or shares or title from all created things is as vain as to strive to abstract the ideas of time or space from matter to which they so closely adhere. No sooner do we deduce conclusions from such impossible conceptions that we are entangled in contradictions and perplexities and find ourselves in total darkness. These idle speculations, which neither excite mental pleasure nor convince the

17 Wait v. Kern River Min. etc. Co., 157 Cal. 16, 106 Pac. 98; and for the purposes of taxation the situs of shares is that of the owner of the shares, Canfield v. Los Angeles County, 157 Cal. 617, 108 Pac. 705. For the purposes of the inheritance tax law the situs is in the state of incorporation, Murphy v. Crouse, 135 Cal. 14, 19, 87 Am. St. Rep. 90, 66 Pac. 971; McDougald v. Low, 164 Cal. 107, 110, 127 Pac. 1027.

understanding, oppress with that same lack of vital air as do some philosophic or theological theories where the result is zero.

So, notwithstanding it was once said that "stock is one thing and certificates another," that "the former is the substance and the latter the evidence of it,"[18] the courts have gradually been compelled to virtually abandon this artificial reasoning and say a certificate gives complete possession of the shares evidenced by it,[19] and the New York courts say that "a certificate of stock has gradually grown to be more than a mere receipt or evidence of stock, but in business transactions has come to be the stock itself, and, like a promissory note, property in itself." The mercantile world built up the "law merchant" upon its own responsibility, and so gradually it is building up a law on this subject, independent of, really in direct opposition to all the unsubstantial reasoning of judicial tribunals on the subject.

In the effort to make these so-called principles work, has arisen the greatest diversity of views in the different states of the Union on the effect of transfers, attachments, executions, liens, assessments, taxation, and indeed almost everything which might affect stock or a certificate, and, naturally, there has arisen a corresponding confusion. Decisions in many states, our own included, are not in harmony with each other, a conspicuous example in this state being the effect of

18 Hawley v. Brumagin, 33 Cal. 394-399; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80; Craig v. Hesperia Land etc. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10; and also on the point that shares are personal property, Atkins v. Gamble, 42 Cal. 86-99, 10 Am. Rep. 282; Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359-364; Tregear v. Etiwanda Water Co., 76 Cal. 537, 539, 9 Am. St. Rep. 245, 18 Pac. 658.

19 Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 603, 23 Pac. 134.

a levy of an attachment or execution upon shares of stock, or stock certificates, and of a sale based upon and following such a levy. The doctrine of "non-negotiability" is rigidly applied in this state, but the business world virtually ignores this rule in the actual conduct of its affairs. For other cases of this character see "Taxation."

SHARES HELD BY FOREIGN EXECUTOR—STATUS—ADMINISTRATION

It was held where a resident of another state, having in his possession certificates of stock in a California corporation, dies in such other state and his will is probated there, and under a provision of the will he gave his executor power to sell and convey all of his property, and under that power the executor sold the certificates of stock, that the title of the purchaser was complete, and he was entitled to have a transfer of the stock made to him on the books of the corporation, and that without furnishing the bond required in section 326 of the Civil Code; it was not necessary to have letters of administration issued in this state in order to obtain the transfer, there being no ancillary administration in this state.[20]

While this case has not been expressly overruled, some doubt has been cast upon its correctness, the supreme court in a later case saying: "Perhaps, by comity, such assignment of a chose in action would be permitted in this state when there is no local administration."[21] The court says, further, the common law rule that the title of personal property, wherever situated, is in the executor appointed at the domicile

20 Brown v. San Francisco Gaslight Co., 58 Cal. 426; see Fox v. Tay, 89 Cal. 339, 350, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 817; McCully v. Cooper, 114 Cal. 258, 262, 55 Am. St. Rep. 66, 35 L. R. A. 492, 46 Pac. 82.

21 Murphy v. Crouse, 135 Cal. 14-19, 87 Am. St. Rep. 90, 66 Pac. 971.

of the decedent, and that this executor "has the absolute right to dispose of the same, has never prevailed in this state. Here both real and personal property descend directly to the heir or to the beneficiary named in the will, with the qualified right in the personal representative, who holds it, for the purposes of administration, more like a receiver than like a common law executor. The title is not in him, nor has he the power of disposal, save by the order of the court," and adding the observation that "even at common law, where an ancillary administrator has been appointed in a foreign jurisdiction, the title to personal property which has its *situs* in such foreign country is in the ancillary administrator.[22] The court further says that it is true that for most purposes choses in action follow the person of the owner, but not for purposes of administration. For such purposes the *situs* is where the debtor resides;[23] the principal reason for which is that no state will allow property to be taken from its borders until debts due its own citizens have been satisfied. But still it is not necessary to show that there are debts due our own citizens to obtain such administration, and, though the administration is called ancillary, it is really wholly independent; the surplus after full administration may be remitted to the domiciliary administrator to be distributed according to the laws of that state.

After briefly mentioning the discussion by text writters, and their conclusion that for many purposes a certificate of stock is itself a personal chattel or tangible property in the same way that promissory notes are so regarded, the court says: "A transfer of the certificate transfers the title to the shares, as between

22 Ibid. citing McCully v. Cooper, 114 Cal. 258, 55 Am. St. Rep. 66, 35 L. R. A. 492, 46 Pac. 82, and numerous other cases.

23 The court has held that this fiction will not be recognized where a foreign corporation does all of its business in this state. Wait v. Kern River Min. etc. Co., 157 Cal. 16-21, 106 Pac. 98.

the parties. A certificate of stock is, after all, only the evidence of certain contract rights against a corporation, enforceable only, as a rule, where the corporation is. It is evidence of a right to property, in this state, which the same legal policy which forbids the removal of other assets of decedents, so long as there may be demands against the former owner unsatisfied, would require to be administered here. Stocks are usually classed as choses in action, but whether they are such or not, they constitute property of a decedent actually in this state, and can be reached here, and here only, by creditors." The injunction against the ancillary administrator selling the certificate of stock was dissolved. Thus the certificate, notwithstanding, is being dealt with as property and not as evidence, for as evidence it is merely proof of what occurred at some time in the past—it is not even what occurred. And as stocks have their *situs* only at the home office, or residence of the corporation, and it is only the certificates which are transitory, it is only the certificate which can be seized in a foreign jurisdiction, and hence it must be something more than mere evidence, more than a mere record of what was done at some former time; it must be something substantive to be property and it is property only which can be seized by process. Notwithstanding the host of cases based on old philosophical declarations, Latin maxims suitable, it may be, to another age of the world, definitions which may have circumscribed a state of affairs once existing, or fictions which the law creates with so much avidity, the present world and the forward movement of human affairs are going right on, regardless of all these cases, and gradually making these certificates not only property, but, in a sense of the word, the stock itself.

RIGHT OF TRANSFER

Unlike an interest in a partnership, the transfer includes the right of the purchaser to participate in the conduct of the business to the same extent as his vendor could, and this right existed at the common law independent of the statute; the effect of this statute is simply to prescribe the mode of making the transfer, the time it takes effect, and other details. The holder's right to make a transfer is absolute; the corporation can not abridge it,[24] nor does the law, so long as the corporation is solvent,[25] and then only to the extent that the vendor can not relieve himself of his statutory liability.[26]

CORPORATION MUST MAKE TRANSFER

It is the duty of the corporation to make the transfer on demand if it have no lien on the stock,[27] and a suit in equity, seldom if ever *mandamus,* may be brought to compel the transfer.[28] But where a corporation's charter has been forfeited on account of failure to pay the license tax, the directors becoming trustees for winding it up, it has ceased to exist; neither the corporation nor the directors can be compelled to do business by reissuing stock transferred from one of its stockholders to another person; they can not be allowed

24 Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359, 364; National Bank v. Western Pac. R. Co., 157 Cal. 573-582, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

25 National Carriage Mfg. Co. v. Story etc. Co., 111 Cal. 531, 44 Pac. 157; Welch v. Sargent, 127 Cal. 72, 78, 59 Pac. 319.

26 Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

27 People v. Crockett, 9 Cal. 112; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143; Ralston v. Bank of California, 112 Cal. 208, 213, 44 Pac. 476.

28 Spangenberg v. Western etc. Iron Co.,.166 Cal. 284, 135 Pac. 1127.

to perform any further functions as a corporation or as directors.[29]

Without citation, or distinguishing this case, the district court of appeal held that a banking corporation, being wound up, notwithstanding an injunction prohibiting it doing any further business, could be compelled to make just such a transfer.[30]

If a foreign corporation forfeits its right to do business in this state, its condition is analogous to that of a domestic corporation whose charter has been forfeited; it can thereafter exercise no corporate power in this state, its directors as trustees must settle up its affairs here, and neither can the corporation or its directors be compelled to continue business by transferring stock from the seller to the purchaser.[31] But the new holder of the stock is not without remedy; he is entitled to an accounting and to participate in the distribution of the assets of the corporation. There is no conversion of the stock by the corporation so refusing to make such transfer.[32]

If a corporation refuses to make a transfer to which the stockholder is entitled, it is not necessary to allege that such refusal was wilful; a simple statement of the refusal makes a *prima facie* case of the stockholder's right to recover from the officer refusing the four hundred dollars penalty prescribed in this section. The officer who undertakes to determine the right to the transfer acts at his own peril.[33]

But it is not the duty of the officers to inquire into the motives of an attorney in fact for demanding that

29 Lewis v. Miller & Lux, 156 Cal. 101, 102, 103 Pac. 496.

30 People v. California Safe etc. Co., 18 Cal. App. 732, 124 Pac. 558.

31 Carpenter v. Bradford, 23 Cal. App. 560, 138 Pac. 946.

32 Ibid.

33 Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343.

the transfer be made to himself,[34] and the owner's right to a transfer can not be defeated by the fact that an assessment has been levied upon the shares which is still unpaid; the identity of the stock or shares is not affected by the transfer,[35] and it has been held that the corporation is not a necessary party to a suit to compel a stockholder to make a transfer to the purchaser,[36] although it is not an improper defendant.[37]

It was early held[38] that a stockholder was not entitled to a writ of mandamus to compel the officers to transfer stock upon the books of the corporation, because the stockholder had a plain, speedy, and adequate remedy at law in an action for damages for such refusal, quoting with approval the statement that "it might as well be required in every case in which trover would lie"—another instance of making misfit rules govern new and dissimilar conditions. But the same result may be reached by a suit in equity to compel the transfer.

There was a *dictum* in the next case[39] where it was said that "a suit in equity where registration of the transfer may be compelled or damages recovered as an alternative may be preferable, but it is not exclusive of the remedy" for conversion, citing Morawetz and Cook on Corporations. Without referring to this case, later, a court of equity compelled the corporation to

[34] Tafft v. Presidio etc. R. Co., 3 Cal. Unrep. 152, 156, 22 Pac. 485; but see same case, 84 Cal. 131, 138, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

[35] Craig v. Hesperia Land etc. Co., 113 Cal. 7-12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

[36] Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120.

[37] Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458.

[38] Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157.

[39] Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

make the transfer,[40] and where it was claimed that stock had been wrongfully transferred a suit in equity can be maintained against the transferee and the corporation to compel the former to return the stock (certificate) and to compel the corporation to transfer the same on the books of the corporation,[41] and without citing either of above cases, this power of a court of equity was again declared.[42]

Or the corporation may bring a suit interpleading the claimants, and compel them to litigate between themselves their rights to it. If it does not do this but makes the transfer, after notice, it does so at its own risk.[43]

CONVERSION

A novel rule has recently been announced affecting the liability of a corporation making a transfer of stock on its books and issuing a new certificate therefor to the claimant. A notice had been served upon the corporation by the administrator of the estate of the original owner that the stock still belonged to the estate although the certificate had been indorsed in blank by the deceased, and demanding that it make no transfer thereof. The claimant, having possession of the certificate so indorsed in blank, presented it for transfer to himself, which transfer the corporation refused to make; later a bank presented and surrendered the certificate to the corporation and had a new certificate made to itself as pledgee; still later the stock was trans-

40 Spurgeon v. Santa Ana Val. Irr. Co., 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140; Calkins v. Equitable Bldg. etc. Assn., 126 Cal. 531, 59 Pac. 30.

41 Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934.

42 Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 68, 65 Pac. 143.

43 Cooper v. Spring Valley Water Co., 16 Cal. App. 17, 27, 116 Pac. 298.

ferred on the books of the corporation to third parties, without qualification. After saying, as to transfers of stock, that the corporation "occupied a fiduciary relation" to all owners or claimants of its shares, which is generally conceded, the court then said that the title to the stock passed from the claimant to the corporation and momentarily rested in it, and thereafter it passed on to the person to whom the corporation transferred it upon its books. On a rehearing, it was said that perhaps this statement was *dictum,* but the court expressly declined to say that it was erroneous. As a consequence, the corporation was held to be bound by all admissions or statements made by the claimant from whom it thus momentarily received the title in regard to his right to the stock, although made to third parties and without the knowledge of the corporation, and held the corporation liable for the value of the shares so transferred, as upon conversion.[44]

In a suit against a corporation for conversion of shares which its officers refused to transfer on the books of the corporation, damages as a consequence of such refusal must be alleged.[45]

The rule for ascertaining damages, where the action is timely brought, is the highest market price of the stock at any time between the conversion and the verdict, without interest,[46] but if there is great delay in bringing a case to trial (several years in this case),

44 Cooper v. Spring Valley etc. Co., 171 Cal. —, 153 Pac. 936.

45 Edwards v. Sonoma Valley Bank, 59 Cal. 136. See Morrison v. Gold Mountain etc. Min. Co., 52 Cal. 306, as to whether special facts amount to a conversion. This decision seems to be unsound on all accepted principles.

46 Fromm v. Sierra Nevada etc. Min. Co., 61 Cal. 629; Civil Code, Sec. 3336; Dent v. Holbrook, 54 Cal. 145; Potts v. Paxton, 171 Cal. —, 153 Pac. 957.

the damages were limited to the value of the stock at the time of the conversion, with interest.[47]

SPECIFIC PERFORMANCE OF CONTRACT TO SELL

Specific performance of a contract between individuals to sell and deliver stock of a corporation in a proper case will be decreed, for the shares may have no market value, or peculiar conditions may give a special value to them to the purchaser, or other shares can not be procured because no holder will sell,[48] and that fact strengthens the right to claim a transfer instead of damages for conversion against the corporation.

LIEN OF CORPORATION PREVENTING TRANSFER

It is possible in this state for a corporation to refuse to transfer shares when the party transferring the shares is indebted to the corporation, if by contract the stockholder has agreed that the corporation shall have a lien on his stock, as by the insertion of such a provision in the stock certificate;[49] but a provision in a by-law to that effect is not sufficient unless the purchaser of the stock has actual notice of the by-law.[50] It was said, in the last case cited, that such a by-law is inconsistent with the provisions of section 324 of the Civil Code. But even in a case where such a lien is

47 Ralston v. Bank of California, 112 Cal. 208, 214, 44 Pac. 476.

48 Wait v. Kern River Min. etc. Co., 157 Cal. 16, 24, 106 Pac. 98; Treasurer v. Commercial etc. Min. Co., 23 Cal. 390; Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; Gilfallan v. Gilfallan, 168 Cal. 23, Ann. Cas. 1915D, 784, 141 Pac. 623, and cases cited.

49 Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852.

50 Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359, cited in Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600-3, 23 Pac. 134.

provided in the stock certificate, if the corporation assigns the debt, the right to the lien is lost.[51]

No such lien could arise in this manner at common law, its policy being, as stated, to discountenance secret liens, as they hamper trade and restrict the safe and speedy transfer of property. Ohio, Pennsylvania, and Connecticut also have held such a provision in the stock certificate valid, but it is not valid in a stock certificate of a national bank.

CERTIFICATES NON-NEGOTIABLE

The doctrine of negotiability grew up from the custom of merchants, which finally was recognized by the law. This was at a period when corporations were few, and were largely instruments of government, or agencies of the sovereign, and when membership was a more important feature than the pecuniary investment. The dealings of merchants, so far as written obligations passing from hand to hand were used, were confined wholly to bills of exchange, promissory notes, and the like. When the statutes came to define negotiability, for conflict in the customs of merchants in different cities arose, they dealt only with such things as were commonly the subjects or instruments of commerce, so the definition was limited accordingly. Negotiable instruments were declared to be bills, notes, and the like, payable in money only, usually at a fixed time, without conditions, to bearer or to the order of the payee.[52]

The right to be a member of a corporation was a privilege granted by the sovereign, and in the early days the right of succession was jealously guarded, and it was common for the charter to provide that

51 Ralston v. Bank of California, 112 Cal. 208-213, 44 Pac. 476.

52 The Civil Code, sections 3086 et seq., are a redeclaration of the earlier rules and statutes, with some enlargements.

the corporation should have discretionary powers in approving or disapproving transfers of interests or shares. These privileges were valuable, and, being held by favorites and the wealthy class, distinguished the members from the great body of the people, and therefore the desire arose to make entry into them difficult (like the acquiring of real estate). As a consequence the law of "negotiability" was never made applicable to the purchase of shares in corporations, but was vigorously rejected whenever an effort was made to do so, and in England, even today, certificates of stock are not negotiable in any sense—not even quasi-negotiable.

In this country, which inherited its laws from England, the earliest decisions established the doctrine of non-negotiability of stock certificates, and to a considerable extent that rule still prevails in many of the states. But there has grown up in this country a rule of what is commonly called quasi-negotiability (which is not recognized in England even as to American stocks which are dealt in there) and the application of the doctrine of estoppel (which is really the base upon which negotiability rests), thus eliminating many of the difficulties in sales of stocks and protecting purchasers to some extent.

In the first case in this state where this question arose, the court said: "Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply muniments and evidence of the holder's title to a given share in the property and the franchise of the corporation of which he is a member.[53]

[53] Atkins v. Gamble, 42 Cal. 86-99, 10 Am. Rep. 282; which declaration was affirmed in several cases cited in Craig v. Hesperia Land etc. Co., 113 Cal. 7-13, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

It is significant, however, that the only cases where this doctrine has been applied in this state were where the certificates had been lost or stolen, or where the rights between the corporation itself and the purchaser of the certificates were involved.

IDENTITY OF SHARES REMAINS

Notwithstanding certificates for stock are sold and indorsed, and are transferred on the books of the corporation, the identity of the shares is unaffected;[54] they continue to be the same shares. This is a very important matter when assessments and stockholder's liabilities are concerned.

INDORSEMENT AND DELIVERY SUFFICIENT

The statute itself declares that a transfer of a stock certificate by indorsement by signature of the owner and delivering of the certificate is valid as between the parties, without transfer on the books of the corporation; but, except as to the parties thereto, it is not valid until it is so entered. Even if the seller keeps the certificate, using it as collateral security for his debts, still the sale is good against his creditors, there being no fraud.[55] And momentarily recognizing the universal method of passing the ownership of certificates prevailing in commercial circles, in an opinion not officially published, our supreme court said: "It did not matter that the stock stood on the books in the plaintiff's name. These indorsed certificates do pass from hand to hand, and such is the usual mode of selling stock."[56]

54 Hawley v. Brumagim, 33 Cal. 394; Craig v. Hesperia Land etc. Co., 113 Cal. 7-12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

55 Evans v. Sparks, 170 Cal. —, 150 Pac. 372.

56 Krouse v. Woodward, 5 Cal. Unrep. 230, 42 Pac. 1085.

The courts have gone further in interpreting this section. They say: "It has been determined by the decisions of this court interpreting these provisions that, even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers and transferees in good faith for value and without notice. Actual notice of such an intending purchaser by one having a prior claim upon the stock, even though this claim be not noted in the books of the corporation, is sufficient."[57] But if there is no delivery of the certificate, the transfer is not effectual,[58] except as between the parties.[59] It was held that indorsement and delivery before a debt of a corporation was incurred was not only a sufficient transfer, but also sufficient to relieve the vendor (really a donor) of stockholder's liability on account of such stocks.[60] This was holding that such a transfer was good as to certain third parties, creditors. The court has also said, *dictum,* concerning the necessity of entering the transfer on the books of the corporation: "But, ordinarily, the rule goes no further than to protect the corporation in paying dividends to a recorded stockholder, in the absence of notice of transfer or other right."[61] The above statements of general rules should be further modified. Where, after the assessment was levied, but before proceedings were taken by suit to collect the same, the owner sold, indorsed, and delivered the cer-

57 Spreckels v. Nevada Bank, 113 Cal. 272, 276, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329, and cases cited.

58 McFall v. Buckeye etc. Assn., 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. 253.

59 Tregear v. Etiwanda etc. Co., 76 Cal. 537-540, 9 Am. St. Rep. 245, 18 Pac. 658; as a pledge delivery and continued change of possession must be made, as by the rules which govern the pledging of other instruments, McFall v. Buckeye etc. Assn., 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. 253.

60 Moore v. Boyd, 74 Cal. 167, 174, 15 Pac. 670.

61 Ashton v. Zella Mining Co., 131 Cal. 408, 410, 66 Pac. 494.

tificate of stock to another, but the transfer was not entered on the books of the corporation, it was held the vendor was liable for the assessment, the court saying: "For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books."[62]

In an election case, the court said: "A transfer not entered on the books of the company has no validity outside the parties to such transfer, . . . confers on the transferee, as between himself and the company, no right beyond that of having the transfer properly entered. Until that is done or demanded to be done, the person in whose name the stock is entered . . . is the owner to all intents and purposes; and particularly for the purpose of an election."[63]

MANNER OF TRANSFER

As between the parties, that is the purchaser and the seller, it is sufficient for the seller to indorse his name on the back of the certificate accompanied by a delivery of the certificate, the same as in the sale of a promissory note. It is not prudent and safe, however, to do no more than write the name on the back; the indorsement should state that the vendor sells the shares and authorizes and directs their transfer on the books of the corporation, and be dated (which often is an important matter), and, where practical, contain

62 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. 10; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280.

63 People v. Robinson, 64 Cal. 373, 375, 1 Pac. 156. Distinguished on the "bona fide" clause of a statute now repealed. Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 594-5, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. Following the doctrine of People v. Robinson (without citing), Krouse v. Durbrow, 127 Cal. 681, 60 Pac. 438.

the name of the person to whom sold; inserting the name is practical in all cases except where stock is sold through a stock exchange. All stock certificates should have a printed assignment on the back thereof.

Besides, the seller is vitally interested in having the transfer to the purchase entered at once on the books of the corporation in order to escape liability to assessments by the corporation, either to pay the stock up to par if it is not fully paid, or for the promotion of the business, or to pay the debts of the corporation.

It is held in other states that the corporation may require proof of the genuineness of the signature, and, if in doubt as to the competency of the vendor to sell the stock, to demand legal proof of the fact, and require satisfactory evidence of the genuineness of the signature to a power of attorney to sell and transfer stock.[64] Such will undoubtedly be declared the rule here when such a case is presented for decision.

Anciently, it required the presence of the vendor, making request for the transfer, to warrant the corporation in making the transfer on its books. This trouble was avoided by inserting in the assignment a power of attorney authorizing a person named to make the transfer. It has long been the custom to leave the name of the attorney-in-fact to make the transfer blank, filling in the name of a clerk of the corporation when the certificate is presented for transfer. This is the usual method, and nothing less than this, the signature being duly witnessed, is accepted by stock exchanges in New York and the other eastern states as a "good delivery."

A common provision in by-laws, or in the certificate itself (evidently copied from the usual forms and by-laws of corporations in the eastern states), is that

[64] Cook on Corporations, sec. 385 et seq.

transfers can "only be made on the books of the corporation personally, or by attorney, upon surrender of this certificate." This provision would not be valid so far, if it does to any extent, as it abridges the right of transfer provided in this section by "indorsement by signature" of the owner, etc. No good or practical reason exists for requiring the owner, or his attorney in fact, to personally enter the transfer; all that reasonably could or ought to be required is a genuine signature to the assignment.

But a transfer by simple indorsement of the name of the vendor on the back of the certificate is not uncommon in this state, and probably this section and the decisions cited below[65] make it sufficient in law, but the practice is loose and not to be commended.

The mere possession of a certificate which was issued to a person, afterwards deceased, and unindorsed by the deceased, is not evidence of ownership; these facts are not sufficient evidence that the title passed to the possessor.[66]

Evidence that certificates (given by an employer to his confidential clerk for the purpose of qualifying him to act as a director in a corporation) were found after the death of the clerk in a private wallet belonging to the clerk in the corporation safe (to which the clerk was the only person who had access), duly indorsed by the clerk, is not sufficient to prove the redelivery of the certificates to the employer; they belong to the estate of the deceased clerk.[67]

[65] Graves v. Mono Lake etc. Mining Co., 81 Cal. 303, 325, 22 Pac. 665, and cases cited. Brittan v. Oakland Bank of Savings, 124 Cal. 282-289, 71 Am. St. Rep. 58, 57 Pac. 84.

[66] Nicholls v. Reid, 109 Cal. 630, 632, 42 Pac. 298, and cases cited.

[67] O'Neil v. Donahue, 57 Cal. 226.

BY AGENT, ATTORNEY IN FACT, ETC.

A corporation is bound to know the authority of such special agent, and if the power of the agent to make the transfer is insufficient but the corporation notwithstanding makes the transfer, it is liable for a conversion of the stock. A power of attorney authorizing, among other things, "the exchange of old certificates of stock for new ones in lieu thereof," and concluding with general words giving power to manage and control all property, etc., and to execute all "instruments requisite or proper to effectuate all or any of the premises" is a special, and not a general power, and does not confer power to sell stock of the principal.[68]

A power of attorney giving authority "to sell, dispose of, transfer and deliver all or any of my interests in the capital stock of any association," etc., and containing the same general concluding clause as in the above case, does not authorize an attorney in fact to transfer the shares to his own name; nor was the indorsement of the certificate by the attorney in fact, without stating for whom he was acting, a sufficient indorsement, and, the corporation transferring the certificates notwithstanding, is liable for conversion of the stock.[69]

LAW GOVERNING VALIDITY

The validity of a transfer of stock is governed by the law of the place where the corporation is created, and not by the law of the place where the negotiations of sale may have been conducted.[70]

68 Quay v. Presidio etc. R. Co., 82 Cal. 1, 22 Pac. 925.

69 Tafft v. Presidio etc. R. Co., 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436, reversing same case, 3 Cal. Unrep. 152, 156, 22 Pac. 485.

70 Dow v. Gould etc. Min. Co., 31 Cal. 629, 630-654.

TRANSFER WITHOUT INDORSEMENT

Where a borrower delivers a stock certificate to the lender as security for the loan, but does not indorse the certificate, the transfer is good between the parties, there being no rights of innocent purchasers or creditors intervening.[71] The court said it is well settled in construing this statutory provision that entry of the transfer on the books of the corporation is not essential to the validity of the transfer except as to purchasers or transferees in good faith for value and without notice; and, while the theory is that the shares of stock are distinguished from the certificate therefor (which is but evidence of title of the holder to a portion of the property, which shares or property are incapable of manual delivery), and that a delivery of the certificate without a transfer in writing which will enable the holder to make a transfer of the stock on the books of the corporation is not a complete delivery, yet there is no reason why the doctrine of "equitable mortgage" should not apply to such a case.

PLEDGE OF STOCK

Nearly all of the cases involving the power to pledge shares of stock as security for the payment of a sum of money or the performance of an obligation have involved the form or legality of the transfer, and are fully considered in the cases on the subject of transfers cited under Civil Code, section 324, *supra*.

In those cases it will be observed that the laws and decisions of this state differ in some important respects from the general current of authority. No attempt will be made here to cover any of those points already considered; notice will be here taken only of the remaining cases involving other points or general principles.

71 Hall v. Cayot, 141 Cal. 13-17, 74 Pac. 299; Ede v. Johnson, 15 Cal. 53.

In one of the earliest cases on this subject it was decided that where stock belonging to a pledgor is transferred on the books of the corporation to the pledgee, the pledgee is the owner of the stock so far as third parties who have no notice of the relations existing between the pledgor and pledgee are concerned.[72] This statement remains, unshaken, the law to this day.

In a later case[73] it was decided also that when one delivers stock certificates to his broker, duly endorsed, and thereafter the broker sells or hypothecates them, the purchaser or pledgee gets good title to them, the court saying: "The party who places another in a position to enable him to practice the fraud should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him."

This also remains the law to this day, with an important modification in case of certificates which the owner has endorsed in blank which afterwards are stolen or purloined from him.

As between the pledgor and the pledgee only, the legal title remains in the pledgor.[74] But the pledgor is not entitled to demand that the identical shares be returned to him;[75] this, however, should be taken sub-

72 Strout v. Natoma W. & Min. Co., 9 Cal. 78-80.

73 Thompson v. Toland, 48 Cal. 99-112. This principle was reaffirmed, without citing this case, in Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271. And the fact that dividends were being paid on the shares, which were not paid to the pledgee, or the fact that the stock was pledged to secure an antecedent debt, does not alter the case.

74 Cross v. Reid Eureka etc. Canal Co., 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885.

75 Hardenbergh v. Bacon, 33 Cal. 358, 384; Atkins v. Gamble, 42 Cal. 100, 106; Thompson v. Toland, 48 Cal. 99, 116; Hayward v. Rogers, 62 Cal. 348; Bell v. Bank of California, 153 Cal. 234, 239; 94 Pac. 889.

ject to qualification when the shares proposed to be delivered to him differ from those delivered to the pledgee in the amount paid up thereon, unpaid assessments, etc.[76]

The rule that shares of stock can not be pledged without a written transfer of title applies only where rights of third parties are involved; a delivery of the stock certificate by way of pledge without any endorsement vests an equitable title in the pledgee, enforceable between the parties.[77] It has also been held, where the pledgee sold the note for the payment of which stock had been delivered to him as security, that his right to the stock pledged went with the note to the purchaser, notwithstanding the pledgee did not actually deliver the stock pledged with the note to the purchaser, and that if the pledgee continued to hold the collateral he would hold it as agent or trustee for his assignee.[78]

Where a bank president personally held a written agreement from the pledgor simply authorizing him to sell and transfer the stock and apply the proceeds on the debt owing by the pledgor to the bank, and, in order that he might get the stock without the opposition of bidders at a low price, the president sold it privately, without advertising the sale, or demand of payment of the note, or notice to the pledgor of the intended sale, he was held liable to the pledgor for the full value of the stock.[79]

If a pledgee desires to escape a stockholder's liability it is necessary that the transfer books of the cor-

[76] Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084.

[77] Hall v. Cayot, 141 Cal. 13-17, 18, 74 Pac. 299.

[78] Ramboz v. Stansbury, 13 Cal. App. 649, 110 Pac. 472.

[79] Lem v. Wilson, 27 Cal. App. 512, 150 Pac. 641.

poration show that he is a pledgee and not the unqualified owner.[80]

The pledgee must account for all dividends received by him while he held the stock.[81]

FRAUD IN SALE OF STOCK

No attention will be given to cases of this description which involve only general principles, though stock of corporations be the subject matter of the litigation; only cases of this description will be noted where corporate stock was the subject matter of the transaction, and that fact was an important element, and specially affected the reasoning or the decision.

The first and a leading case[82] on this subject was a purchase from an individual of stock in a mining company, which purchase was induced by false representations as to the condition, character, and value of the mine, although the seller believed the property to be valuable, and that the stock was worth the price paid for it. The court said that the purchaser had a right to rely upon the vendor's representation as to facts that were not within the purchaser's knowledge, and that the vendor can not escape responsibility by showing that the purchaser might have ascertained that such representations were untrue; that it is sufficient that the vendor made them, knowing them to be untrue, and for the purpose of inducing the purchase, and that the purchaser relied upon them, making no investigation himself.

Following this case,[83] but not citing it, is one where the purchaser, relying upon and believing false repre-

80 Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

81 Hayward v. Rogers, 62 Cal. 348.

82 Bank of Woodland v. Hiatt, 58 Cal. 234.

83 Dow v. Swain, 125 Cal. 674, 58 Pac. 271.

sentations of the vendor as to the solvency, profits and assets of the corporation, bought the stock. The vendor was the secretary, and the other defendant was a director of the corporation, and the agent of the vendor, both being interested in the transaction. The purchaser knew nothing as to the facts so represented, and was really unable to make a sufficient investigation of them (being an inexperienced woman) although she was shown through the works, and was offered the privilege of having the books examined by experts. The court declared that the purchaser was entitled to rescind the purchase, giving as reasons therefor that the parties were not on an equal footing as to knowledge; that the vendor had knowledge of the facts and the purchaser had not; that the purchaser was not put upon inquiry by having her suspicions aroused; that the purchaser relied upon the truth of the representations; and that the vendor can not excuse himself in such a case by saying the purchaser need not have relied upon them or that there were no confidential relations between them.

Then follows a case[84] where stock was sold to a purchaser to whom the vendor falsely represented that the corporation owned a certain invention and the United States patent therefor, and the purchaser, believing and relying thereon, was thereby induced to purchase the stock; discovering the falsity of these representations he brought suit to rescind the contract of purchase. The court said: "If one makes material false statements to another, to induce that other to buy an article and which does induce him to buy, the defrauding party either knowing them to be untrue, or believing them to be true but having no sufficient ground for such belief, will not be protected from liability for his fraudulent act by the fact that he did not intend to

[84] Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011.

deceive the other party . . . nor is such intent, in such a case, a necessary element of the fraud"; thus going, as will be seen, far beyond the preceding cases. It was also held in this case that the fact that although the value of the stock purchased might equal the price paid, that fact did not affect the purchaser's right to rescind, because he was entitled to receive property having the certain qualities represented.

Thus far all of the cases were between individuals, the corporations themselves, apparently, having no interest in the transactions. Now arises a case[85] where a part of the stock sold belonged to the corporation, and a part to one of the defendants who was a director, and a part to a third person not a party to the suit. The first two lots were purchased of or through the directors; the latter was purchased directly from the third party, apparently without any representations on his part but relying on the correctness of the published financial condition of the bank. The corporation was a national bank, but that fact does not distinguish the case from an ordinary corporation, unless it should be on account of the requirement of the United States statutes that the bank's published statement to the comptroller should contain a statement of the true condition of the bank, rather than its condition as shown by the books of the bank. For all practical purposes it probably does not, for crafty statements as to the book values only do not carry much weight. The action was against the directors to recover damages for deceit, rather than for rescission —probably because the bank was wholly insolvent, and rescission could not be maintained against the third party, for he made no representations. It was claimed that deceit was practiced upon the purchaser by the directors by false representations as to the true finan-

[85] MacDonald v. De Fremery, 168 Cal. 189, 142 Pac. 73.

cial condition of the bank appearing in the published official report thereof (which was signed by them), thus inducing him to purchase the stock at a gross over-valuation. The court held that if the directors signing this report knew that the same contained over-valuations which were material, they were individually liable to the purchaser who in good faith relied upon such report in making his purchase; and they say that this report need not be his sole reliance, it being sufficient that it was one of the inducements to his purchase; that it does not matter that this report was not published for the purpose of deceiving any particular individual; that deceit may be negative by suppression of what is one's duty to declare, and that the purchaser was justified in relying upon this report without making any independent investigation himself. This decision is very far reaching, and makes the publication of statements of the financial condition of corporations a matter of grave importance, attended with much risk to the officers giving them out.

Where associates in a business enterprise form sundry corporations, of which they own all the stock, as instrumentalities through which to carry out their purposes, no other interests being involved, and the transactions between them being fair, irregularity in the corporate proceedings to give them effect can not be availed of to impair or overturn the equitable rights of any of the parties.[86]

Nor is the transfer of all its property by a corporation to a foreign corporation, in order that threatened litigation may be conducted in the federal courts, evidence that the conveyance was fraudulent; and this even when one person owned substantially all of the stocks of both corporations, and the judgment creditor of the grantor corporation was, on account of such

[86] Wise Realty Co. v. Stewart, 169 Cal. 176, 146 Pac. 534.

transfer, unable to collect his judgment against the grantor corporation.[87]

AS AGAINST ATTACHMENT LEVY AND SALE

It is not necessary under the statute that the sheriff should take the shares (certificates?) into his possession to make a valid levy (section 542, Code of Civil Procedure), nor to make a valid sale under execution (section 688, Code of Civil Procedure). One who in good faith purchases, at an execution sale, shares standing on the books of the corporation in the name of the execution debtor, and without notice that the shares have been pledged to another, gets good title to the shares and is entitled to have the certificate for the shares reissued to him,[88] "and for that purpose [*dictum*] the court would, upon appropriate proceedings, compel the surrender of the original certificate, in order that it might be reissued to the purchaser." No suggestion is made, by further *dictum*, what could be done if the party owning the certificate resides beyond the jurisdiction of the court. If the old certificate could not be secured, issuing a new certificate would make an over-issue of capital stock floating about in the markets; if the execution purchaser could not get a certificate until the old one was secured and cancelled, the value of his property rights would be greatly reduced. Thus does this doctrine of the intangible, imponderable, invisible quality of shares, ignoring the certificate, produce confusion, and disarrange the orderly course of corporate affairs and business.

87 Manning v. App Consol. etc. Min. Co., 171 Cal. —, 154 Pac. 301.

88 West Coast etc. Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622. A suit may be brought for conversion of the "shares" as distinguished from the "certificates." Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

Another anomaly, not contained in the statutes, is stated by the court in this manner: "Under this section a pledgee of stock has the right, and, indeed, as an ordinary business precaution it may well be his duty, to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, as this section contemplates." But unless a transfer of the stock on the books of the company be necessary for the pledgee's protection, "it will not be adjudged to be within his rights, for the effect of it might be to imperil valuable rights and privileges of the pledgor," such as the right to vote and to receive dividends, and questions of the removal of the stock[?] to foreign jurisdictions, and (the certificates being indorsed in blank under the agreement that they should not be transferred before the maturity of the debt) the court adds: "All that section 324 of the Civil Code exacts of the pledgee, for the protection of his interests, is that he should cause the transaction and the nature of it to be so entered upon the books of the corporation as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer."[89] In another case the court quotes from Cook on Corporations with approval: "Where a corporation has notice that a stockholder holds his stock as trustee for another, it is bound to refuse a register of the trustee's transfer until it is satisfied the trustee has power to make the transfer. If the corporation allows the transfer, and the trustee had no power to make it, the corporation is liable to the *cestui que trust,*" and

[89] Spreckels v. Nevada Bank, 113 Cal. 272, 277, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329. Followed in Welch v. Gillelen, 147 Cal. 571-577, 82 Pac. 248. But if the secretary enters the transfer as absolute, still the facts may be shown. Shattuck & Desmond W. Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348. See Manning v. App Consol. etc. Min. Co., 171 Cal. —, 154 Pac. 301.

it is not liable for a conversion for refusal to transfer the stock contrary to the trust agreement.[90]

There is, however, no provision in section 324 which requires a corporation to enter the terms of a transaction between a pledgor and pledgee upon its transfer or any other books; nor any provision that "exacts" from the pledgee for the protection of his interests, much less of the corporation, that the *nature* of the *transaction* should be entered on its transfer or other books. Under this section, if the transaction is a transfer, it may be entered on the books, otherwise not, which entry of transfer contains only the names of the parties making it; the corporation ought not to be made responsible for the correct interpretation of contracts between its stockholders to which it is not a party. If the word "pledgee" is inserted after the name in the certificate, the effect should be more than to indicate that the holder is charged with some trust, one in which the corporation has no interest, not that the corporation is bound by some trust between other parties to which it is not a party and in which it has no interest. The case of executors, etc., is different; their rights and powers are determined by law. The putting of the word "pledgee" after the name of the owner in the certificate ought to have no more effect than putting the word "trustee," which has none at all as affecting the power of the holder to transfer it.[91]

In a very late decision, where the designation after the holder's name was "trustee," the supreme court has expressed its views as to the futility of entries made on the records which the statute does not expressly require to be made. Following the stockholder's name with the word "trustee," the secretary

90 Young v. New Standard etc. Co., 148 Cal. 306, 83 Pac. 28.

91 Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99; Fletcher v. Kidder, 163 Cal. 769, 770, 127 Pac. 73.

made the entry, "Stock owned jointly by J. F. Kidder and Geo. Fletcher." The court said: "The entries were not such as the secretary was required to make, had no proper place on the books where entered," and excluded them as evidence.[92]

If, however, the certificate itself reads "pledgee for A," an assignment ought to have the signature of "A" also, for there it may be fairly said that the certificate is in favor of both; and the corporation should not be subjected to the risk of a proper determination of the terms of the pledge, or of the fact of its liquidation.

In the end the matter will have to be solved by statutes giving to stock certificates at least a *quasi* negotiability, as is the rule in so many states, and requiring the seizure of the certificate itself in order to secure title to the shares; otherwise that attachment or execution creditors be left to such other remedies as the law and the procedure of the courts afford.

Until actual sale, however, the levy of an execution or of an attachment, under the general doctrine in this state that such a levy seizes nothing but the actual title or interest of the debtor, the rights of the real owner or the pledgee of the certificate are unaffected by the levy; and he may, in the interval between the levy and sale, present his certificate to the corporation and demand and obtain a transfer of the stock on the books of the corporation to himself, which done, the levy falls to the ground.[93]

[92] Fletcher v. Kidder, 163 Cal. 769, 770, 127 Pac. 73.

[93] National Bank of Pacific v. Western Pacific R. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676. This case contains a full discussion of all California cases on this subject, and puts this feature of it at rest. We do not cite the previous cases, for they are explained or distinguished and reduced to unity in this case.

The doctrine that a purchaser at such a sale, if without actual notice of the rights of the real owner, is an innocent purchaser and gets perfect title, is engrafted on the statute; it is not contained in the statute, and is, notwithstanding all the decisions against the negotiability of stock certificates, adopting a portion of the law of negotiability. Or it might be said to rest on the ground of estoppel, which is the foundation stone of negotiability, the owner having negligently failed to enter the transfer on the books of the corporation. But these decisions do not mention either ground as their foundation, referring only to the statute which does not contain a word directly or remotely bearing on the question.

Our own courts have held that where the owner of certificates indorses them and delivers them to a third party for safe keeping, or for the purpose of exchanging them for a new increase of shares, and the person intrusted with them pledges them for borrowed money, the right of the pledgee to the stock as security for his loan is good.[94] Of course, these cases can be sustained only on either the ground of negotiability or estoppel.

While a pledgee may protect himself from loss of his rights in the stock pledged by transferring it on the books of the company (if the certificate is properly indorsed), or by seeing that the purchaser at the execution sale took with notice of his lien, yet, as some rights still exist in the pledgor and they are the subject of private sale, the pledgee is not entitled to an injunction preventing the sale.[95]

[94] Ambrose v. Evans, 66 Cal. 74, 4 Pac. 960; Arnold v. Johnson, 66 Cal. 402, 5 Pac. 796.

[95] Farmers Nat. Gold Bank v. Wilson, 58 Cal. 600.

TRUSTEE

The addition of the word "trustee" after the name in a stock certificate does not have the effect of limiting the power of disposition, nor operate as constructive notice of any secret equities as against persons who, in good faith without notice, purchase or lend money on the stock.[96] The party who placed in another the usual *indicia* of ownership should suffer the loss rather than innocent persons.

LOST OR STOLEN CERTIFICATES

Stocks being held not to be negotiable securities in a commercial sense, if an owner of a certificate indorses it in blank and thereafter loses it, and the finder sells it to a party for value without notice, the purchaser acquires no right to the stock.[97]

In a case[98] shortly thereafter, where such a certificate was sold in the open market by one who had stolen it, the court held that the purchaser obtained a good title. This case was commented on and practically overruled in a later case,[99] the court saying that the purchaser must show negligence on the part of the true owner, and that such negligence was the proximate cause of the deceit upon him, and that where the certificate is stolen without any fault of the owner the thief can pass no title, and the owner may pursue his property. The

[96] Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99; Winter v. Belmont Min. Co., 53 Cal. 428, which case was afterward disapproved so far as it applied the rule governing negotiable securities by Barstow v. Savage Min. Co., 64 Cal. 388, 392, 49 Am. Rep. 705, 1 Pac. 349. See Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098, to same effect as to assessments. Fletcher v. Kidder, 163 Cal. 769, 127 Pac. 73.

[97] Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

[98] Winter v. Belmont Min. Co., 53 Cal. 428.

[99] Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

court also held that the owner was entitled, as against the corporation, to a transfer of the certificate to his name, or as against the purchaser (both being defendants) to a judgment for the value of the stock, but of course not to both. Citing the above cases, the court held that a broker, who in good faith sold such a certificate in the usual course of business, is guilty of conversion of the stock, and liable to the owner for its value.[100]

A similar rule was lately applied to bonds secured by a mortgage which were deposited with a trust company and an officer of the trust company, having *access* to them, taking them and converting them to his own use. The court said the bonds were not negotiable paper, by reason of the terms of the mortgage, and that they were not intrusted to the officer but to the trust company; therefore the otherwise *bona fide* holder could not recover upon them.[101] This remarkable decision led to an act of the legislature in 1915 declaring that bonds payable to bearer shall be negotiable, notwithstanding any conditions in the mortgage securing them.

In a still later case, the secretary, being one of the "managing officers and agents" and the "financial representative" of a corporation, borrowed money on his own personal account of the corporation, delivering shares of its own stock as security for the payment of the same. It appears that the note given therefor, with the stock collateral, was deposited in the company's safe, to which the secretary had constant access. Later the secretary detached the collateral from the note and,

100 Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605, 27 Pac. 33. As to sufficiency of evidence to establish the claim that the certificate was stolen, see Cooper v. Spring Valley etc. Co., 16 Cal. App. 17, 116 Pac. 298, and 165 Cal. 207, 78 Pac. 654, and 171 Cal. —, 153 Pac. 936.

101 Kohn v. Sacramento etc. R. Co., 168 Cal. 1, 141 Pac. 626.

on the faith of it as collateral, borrowed, on his own personal account, a sum of money from the defendant, a bank. Afterward the secretary died insolvent, and the corporation brought suit against the bank to recover this stock. The lower court decided in favor of the bank, but the supreme court reversed this judgment, holding that the corporation was entitled to the stock. And in support of this conclusion the court said that all there was in the bank's claim was that the corporation "trusted a man who occupied one of its responsible positions. Every corporation . . . must do and does the same thing. . . . It was, therefore, not negligence upon the part of the plaintiff (corporation) that it was possible for its secretary to have stolen the pledged stock," and that it can not be said of a corporation employing men "in such capacities it is in any way warranting or guaranteeing" their honesty or integrity in such cases. Thus is the public made to guarantee the honesty of a corporation's officials for the benefit of the corporation. Differentiating "access" and "intrusting," in a case like this, is technical in the highest degree. A corporation, being incorporeal, can have possession of anything only through its officers—it "intrusts" its securities to its officers. Permitting "access" is as culpable an act as "intrusting"; in fact, it is in a sense intrusting. It is obvious that these two decisions open the door wide and are a most effective aid to the accomplishment of great and numberless wrongs, and, moreover, each one in its reasoning overthrows itself.[102]

The prevalence of this doctrine, although the certificate bears the genuine indorsement of the owner, is the result of classification of such instruments as nonnegotiable, and does not rest upon the principles of

[102] Yamato v. Bank of Southern California, 170 Cal. 351, 149 Pac. 826.

natural justice. It would seem to be a rational conclusion that the party who indorses his name in blank upon a certificate without thereupon selling and delivering it, or having it transferred on the books of the company, but retains it in a condition so dangerous to the business public, is himself the one who is guilty of negligence. It is he who gives appearance of title to and puts it in the power of some improper person to defraud the innocent purchaser. It makes the whole world of innocent people guarantee him against loss from his own negligent act. It is another one of the atrocious results reached by the narrow confines of a definition (of negotiability) and a declaration that the case does not come within the limitations of the definition.

Many courts are, however, gradually reaching a proper result by application of the doctrine of estoppel;[108] that is, that the party who places another in a position to enable him to practice the fraud should suffer the loss, rather than the innocent person who deals with the possessor on the faith of the usual *indicia* of ownership (indorsed certificate) with which the true owner has invested him.

RATIFICATION OF TRANSFER, AND ESTOPPEL

While an owner of a stock certificate may ratify a transfer originally made without authority, a mere conversation with an agent who delivers the certificate to another agent, who wrongfully transferred it, say-

[108] Thompson v. Toland, 48 Cal. 99-112; Brewster v. Sime, 42 Cal. 139-147; Dover v. Pittsburg Oil Co., 143 Cal. 501-505, 77 Pac. 405; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271; Morgrage v. National Bank, 24 Cal. App. 103, 140 Pac. 300.

ing he would not hold the first agent responsible, does not amount to a ratification.[104]

WHAT AMOUNTS TO A TRANSFER ON THE BOOKS

The owner of a certificate borrowing money indorsed the certificate and delivered it for a moment only to the lender as security, at once taking it back again, and informed the corporation of the transaction, but requested no transfer be made. Notwithstanding, the secretary wrote on the stub of the certificate in the stock certificate book a statement that the lender (naming him) held same as security for a loan. It was held that this was no transfer, for there was no continued change of possession of the certificate, and the memorandum made by the secretary was made without authority.[105]

In a case where the effect of a transfer would be to transfer a liability in an insolvent corporation, it is particularly necessary to show that the transfer was made with the knowledge and consent of the transferee.[106]

The word "entered," as used in this section, has never been defined. The meaning of this word as used in the constitution in regard to entering matters in the journals of the legislation is said to be only that they be noted, not copied at length.[107]

The court discusses the effect of the record in the stock book in enabling particular shares to be traced and identified, especially with reference to assess-

104 Quay v. Presidio etc. R. Co., 82 Cal. 1, 22 Pac. 925.

105 McFall v. Buckeye etc. Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

106 Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 588-589, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

107 Oakland Paving Co. v. Tompkins, 72 Cal. 5, 1 Am. St. Rep. 17, 12 Pac. 801.

ments.[108] No other decisions on this subject have yet been made. Therefore, the manner, in the meantime, should conform to the manner approved by expert bookkeepers and accountants, which are familiar to all business men.

GIFT IN ANTICIPATION OF DEATH, RESERVING DIVIDENDS DURING LIFE

In anticipation of death, not immediate but not far distant, the owner of stocks made a gift of them to two persons, reserving the dividends thereon to himself during his life. His indorsement of the certificates contained this reservation, and authorized the corporation (without any statement as to time) to transfer them upon its books. He delivered the certificates to one of the two donees, in an envelope not to be opened until after his death. It was held that this was a gift *in presenti*, and not with the intent that it should take effect in the future or to make a testamentary devise.[109] The decision rested on the grounds that the certificates were indorsed and were delivered, and the corporation was ordered to make the transfer on its books. No allusion was made to the fact that the stock did not represent and could call for no specific property; that all it could be was the right to dividends, either from profits earned, or from the assets if the corporation should be wound up; nothing but dividends. And the right to dividends was deferred until after the death of the donor.

A later case was similar in its facts except that the donor delivered the certificates to her own agent to be

[108] Craig v. Hesperia Land etc. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

[109] Calkins v. Equitable Bldg. etc. Assn., 126 Cal. 531, 59 Pac. 30. See Bragg v. Martenstein, 25 Cal. App. 199, 143 Pac. 79; Bragg v. Cummings, 25 Cal. App. 804, 143 Pac. 82.

kept by him until her death, when he was to give them to the donees. The court held there was no delivery of the certificates, and that it was testamentary and not a gift *in presenti*, and, not being executed according to the requirements for executing wills, was invalid.[110]

STOCK IN WATER COMPANIES MAY BE APPURTENANT TO LAND

The provisions of the proviso in this section on the subject of stock in water companies is peculiar to this state, and to some other states where irrigation is extensively employed. This provision was not incorporated in this section, or the law, until 1895.

Prior to the adoption of this provision many corporations for the distribution of water to their stockholders only were organized, in which the stock should receive no cash dividends, but entitled the holder to a stated quantity of water and was to be appurtenant to certain land. These objects were accomplished by suitable by-laws, and sometimes only by the customs of the corporation.

Prior to the adoption of this provision it was held that rules, regulations, and by-laws could not make the stock appurtenant to the land to the extent that the corporation could not sell the stock for assessments and by this operation segregate the stock from the land,[111] notwithstanding, prior to this amendment, it was possible for the owner of such shares to sell them and thus segregate them from the land, yet if he did not do so, the mere power to do so can not destroy their quality as an appurtenance to the land, and the shares

110 Noble v. Garden, 146 Cal. 225, 2 Ann. Cas. 1001, 79 Pac. 883.

111 Spurgeon v. Santa Ana Val. Irr. Co., 120 Cal. 71, 39 L. R. A. 701, 52 Pac. 140.

passed to his devisee as an appurtenance to the land, and not to his residuary legatee.[112]

The right, in a general way, to accomplish these purposes was so well established before the adoption of this provision, that this provision was not much more than declaratory of the law already existing, providing only a definite and exact method of doing so, instead of the various methods theretofore existing. Another effect of this section undoubtedly is to prevent the corporation from segregating the stock from the land to which it is appurtenant by a sale on an assessment.

TRANSFERS BY MARRIED WOMEN, ETC.

Section 325 of the Civil Code is as follows:

> § 325. Shares of stock in corporations standing on the books of the corporation in the name of a married woman may be transferred by her, her agent or attorney, without the signature of her husband, and in the same manner as if such married woman were a femme sole. All dividends payable upon any of such shares of stock may be paid to her, her agent or attorney, in the same manner as if she were unmarried; and any proxy or power given by her, touching any of such shares, is valid and binding, and neither it nor any receipt for dividends need be signed by her husband. (Amended March 20, 1905; Stats. 1905, p. 397.)

As this section was originally enacted in 1892 it read "shares . . . held or owned by married women," etc. This language was amended in 1905 to read, as above, "shares . . . standing on the books of the cor-

112 Estate of Thomas, 147 Cal. 236, 81 Pac. 539; other cases involving the stocks in such water companies, before the passage of this amendment, are Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395; Arroyo Ditch etc. Co. v. Dorman, 137 Cal. 611, 613, 70 Pac. 737; McDermont v. Anaheim Union Water Co., 124 Cal. 112, 114, 56 Pac. 779, and cases cited in these decisions.

poration in the name of a married woman," etc. The remainder of the section is in substantially identical language. It is said that this amendment was designed to make it clear that such shares are presumed to be the separate property of the married woman; it is not apparent how this amendment makes that presumption any more clear or certain.

One taking such stock, whether standing in the name of a woman, married or single, in the absence of something reasonably sufficient to excite his suspicion to the contrary, has a right to assume that she is the sole owner thereof, with the right to transfer the same, and he is not called upon to make any inquiry in regard thereto.[118]

BY NON-RESIDENTS

Section 326 of the Civil Code is as follows:

> § 326. When the shares of stock in a corporation are owned by parties residing out of the state, the president, secretary, or directors of the corporation, before entering any transfer of the shares on its books, or issuing a certificate therefor to the transferee, may require from the attorney or agent of the non-resident owner, or from the person claiming under the transfer, an affidavit or other evidence that the non-resident owner was alive at the date of the transfer, and if such affidavit or other satisfactory evidence be not furnished, may require from the attorney, agent, or claimant a bond of indemnity, with two sureties, satisfactory to the officers of the corporation; or, if not so satisfactory, then one approved by a judge of the superior court of the county in which the principal office of the corporation is situated, conditioned to protect the corporation against any liability to the legal representatives of the owner of the shares in case of his or her death before the transfer; and if such affidavit or other evi-

118 Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271.

dence or bond be not furnished when required as herein provided, neither the corporation nor any officer thereof shall be liable for refusing to enter the transfer on the books of the corporation. (Amended February 16, 1883; Stats. 1883, p. 4.)

This section remains as it was amended in 1874 (the act of 1883 only substituting the "superior court" for "district or county judge"). From the only case we have been able to find where this section has been considered, it may be inferred that it is not necessary for a non-resident to give such a bond, if it is not required by the corporation.[114] The word "transfer" appears to be used in two senses in this section; what point of time is meant by "the date of the transfer" is not clear; if the date of the sale is meant, the provision is doubtless proper; if the day when the certificate is presented for transfer, the validity of the provision is doubtful.

This restriction on the power or right of non-residents to make transfers of stocks on the books of the corporation, so confined to residents of other states of the Union, is, without doubt, in violation of the federal constitution.

LOST, ETC., CERTIFICATES—DUPLICATES

Section 328 of the Civil Code is as follows:

§ 328. Whenever a certificate of stock or of shares in a corporation organized under the laws of this state has been lost, destroyed or wrongfully withheld, the owner thereof may bring an action against such corporation in the superior court of the county in which is located its principal place of business, for the purpose of obtaining a new or duplicate certificate. If by the books of the corporation the stock stands in the name of a person other than the plaintiff, or if by such books it

[114] Brown v. San Francisco Gaslight Co., 58 Cal. 426.

appears that some other person claims or has some right, title, or interest in, or lien upon, such stock, all such persons must be made parties defendant with the corporation. Summons must be issued and served as in other civil actions, and, in addition thereto, the court must direct its clerk to issue and cause to be published, at least once a week for four successive weeks, in some newspaper published in the county, a notice setting forth the pendency of the action, the names of the parties thereto, the court in which it is pending, the name of the corporation issuing the stock, the number of the certificate and the number of the shares, the name of the person mentioned as stockholder in the certificate, and notifying all persons claiming said shares, or any of them, or any interest or lien therein or thereupon, to be and appear before the court at a time and place to be designated in the notice, not less than thirty days from the first publication thereof, then and there to show cause why a new certificate should not be directed to be issued to the plaintiff, and to set forth their rights in or claim to such shares. If any one appears and answers or intervenes in the action, it must proceed to trial as in other civil cases, and the court must enter judgment as from the facts established may be proper; but if no one appears within the time designated in such notice, nor within the time allowed by law after the services of such summons, the court must hear such evidence as may be offered in support of the allegations of the complaint, and make and file its decision thereon, and thereupon may enter its judgment canceling the lost, destroyed or wrongfully withheld certificate and directing the corporation, upon payment to it of all costs incurred by it in the premises and without costs against the corporation, to issue to the plaintiff a new or duplicate certificate. After the issuing of a new certificate by the corporation pursuant to any judgment in such action, no action can ever be maintained by any person against the corporation in reference to said lost or destroyed certificate or the shares represented thereby, and thereafter any such

action is forever barred as against the corporation. (Enacted March 20, 1905; Stats. 1905, p. 500.)

This is a new section first adopted in 1905. The effect of this section, where the suit is brought by the person in whose name the stock stands upon the books of the company when the certificate is indorsed and floating in the market (the real owner not being the plaintiff nor made a defendant or served) and the effect of the last clause relieving a corporation from all liability if, pursuant to a judgment in such an action, it issues a new certificate to the plaintiff, and also the constitutionality of the provisions are very uncertain. The appellate courts have not yet been called upon to consider this section.

LOST OR DESTROYED BONDS

Section 329 of the Civil Code is as follows:

§ 329. Whenever a bond or bonds of a corporation organized under the laws of this state or of any other state, or any territory of the United States, has or have been lost or destroyed in this state by fire, earthquake, or other calamity, the owner thereof may bring an action against such corporation and the trustee or mortgagee of such bonded indebtedness in the superior court of the county in which such bond or bonds were lost or destroyed, or in which owner resides, or in which is located the principal place of business of such corporation, for the purpose of obtaining a new or duplicate bond or bonds. If said bond or bonds stand in the name of, or are registered in the name of a person other than the plaintiff, or if it appears by the books of the corporation that any other person claims or has some right, title, interest in, or lien upon such bond or bonds, all such persons must be made parties defendant with the corporation and the trustee and mortgagee. Summons must be issued and served as in other civil actions and in addition thereto the court must direct its clerk to

issue and cause to be published at least once a week, for four successive weeks, in some newspaper published in the county a notice setting forth the pendency of the action, the names of the parties thereto, the court in which it is pending, the name of the corporation which had issued the bond or bonds, the number of said bond or bonds, if any, and the amount thereof, and the person in whose name the same stands or is registered, and notifying all persons claiming said bond or bonds, or any of them or any interest or lien therein or thereupon, to be and appear before the court at a time and place to be designated in the notice, not less than thirty days from the first publication thereof, then and there to show cause why a new bond or bonds should not be directed to be issued to the plaintiff and to set forth their rights in, or claims to such bond or bonds. If any one appears and answers or intervenes in the action it must proceed to trial as in other civil cases and the court must enter judgment as from the facts established may be proper; but if no one appears within the time designated in said notice, nor within the time allowed by law after the service of such summons, the court must hear such evidence as may be offered in support of the allegations of the complaint and make and file its decision thereon, and thereupon may enter its judgment canceling the lost or destroyed bond or bonds and directing such corporation, upon payment to it of all costs incurred by it in the premises, and upon payment to it of the money required and necessary to re-issue new bond or bonds and without costs against the corporation or other defendant, mortgagee or trustee, to issue to the plaintiff a new or duplicate bond or bonds upon the said plaintiff giving proper indemnity to the said corporation and the said mortgagee or trustee. (Enacted March 6, 1907, Stats. 1907, p. 116.)

To a considerable extent this section is a copy of the preceding one and was a new section adopted in 1907.

Attention is called to the fact that no provision is made by this section for new bonds except in case of loss or destruction of the originals by fire, earthquake, or other calamity. Why it is so limited does not appear from the contents of the section, nor from the nature of the case. The constitutional objections which may be made to the preceding section can not be urged with equal force against this section, for the corporation must be indemnified and the actual *bona fide* holder, not made a party to the proceeding, would not be affected by it.

IF CERTIFICATES IN SAFE DEPOSIT COMPANY BOX

If the owner of stock dies, leaving certificates of stock in the custody of a safe deposit company, bank, or other institution or person, the delivery and transfer of the same can not be made to the administrator or other legal representatives of the deceased except upon certain conditions prescribed in the "Inheritance Tax Law"; a copy of the section of that statute setting out those conditions appears in the note below.[115]

[115] Sec. 13. If a foreign executor, administrator or trustee shall assign or transfer any stock or obligation in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets, belonging to or standing in the name of a decedent who was a resident or non-resident or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interest in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, without retaining a sufficient portion or amount thereof to pay any

tax and interest which may thereafter be assessed thereon under this act and unless notice of the time and place of such delivery or transfer be served upon the state controller and county treasurer at least ten days prior to said delivery or transfer; provided, that the state controller, or person by him in writing authorized so to do, may consent in writing to said delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation hereunder to give such notice or to retain any portion of said securities, deposits or other assets in their possession or control. And it shall be lawful for the state controller or county treasurer, personally or by representatives, to examine said securities, deposits or assets at the time of said delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable to a penalty of not less than one thousand ($1,000.00) dollars, nor more than twenty thousand ($20,000.00) dollars, and in addition thereto said safe deposit company, trust company, corporation, bank or other institution, person or persons shall be liable for the amount of the taxes, interest and penalties due under this act on said securities, deposits, or other assets above mentioned, and said penalties and liabilities of said safe deposit company, corporation, bank or other institution, person or persons for the violation of this section may be enforced in an action brought by the state controller or county treasurer in any court of competent jurisdiction. (Stats. 1913, p. 1075.)

CHAPTER XV

SALES OF STOCK ON MARGINS

The only provision on this subject is contained in article IV, section 26, of the constitution, which is as follows:

> § 26. The legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery.
>
> The legislature shall pass laws to prohibit the fictitious buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange or stock market under the control of any corporation or association.
>
> All contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover any damages for failure to perform the same, or any money paid thereon, in any court of this state. (Amendment adopted November 3, 1908.)

The last clause of the above section was added to it in 1908, in the place of and repealing the following clause:

> All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.

The last clause of the section, as it now stands, is substantially a copy of the New York statute on that subject. It will be observed that all the conditions which make a sale of stock void are in the conjunctive, and, as in New York, for all practical purposes, render it of no effect.

Substantially all of the decisions on this section of the constitution, so far as sales of stock are concerned, were rendered upon the above provision in the original constitution, now no longer a part of the section. The more important ones will be here noted.

In the earliest case on this subject, it was said that it is not necessary that the contract between the broker and his customer should be in writing, and that the statute of limitations does not begin to run on such an account until the date of the last item thereof, and that an agreement by the broker to advance funds for the purchase of the stocks and to pay assessments thereon does not render the contract void;[1] but this case was later distinguished in a manner which substantially overruled it.[2]

Later, the first case in this state embodying the usual transaction on stock exchanges was presented. It was a contract by which the broker agreed to purchase stocks for his customer, charging the customer commissions on the price of the stock and interest on the money advanced by him to make the purchase, the broker holding the stocks purchased as security for the unpaid balances, and the customer maintaining with the broker a satisfactory difference or margin between the purchasing and market prices. The court declared the transaction illegal and void, under the constitution as it then existed, and held that the customer could

1 Kutz v. Fleisher, 67 Cal. 93, 7 Pac. 195.

2 Kullman v. Simmens, 104 Cal. 595, 599, 38 Pac. 362.

recover from the broker all sums paid to him on that account.[3]

It was further said in this case, really sweeping away the theory of the first case cited, *supra,* that the interposition of a broker did not change the real character of the transaction, using the following language: "In the accomplishment of the unlawful purpose he (the broker) took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam,*" and "the end attained, and not the form of the transaction, must determine the question."[4]

Three years later the court reviewed these questions again, at great length, and established the meaning of the term "on margin," and declared that a written contract between the broker and customer designed to take the transaction from under the inhibition of the constitution was ineffective, saying that the court would look beyond this written contract to discover its real character, and re-affirmed all of the doctrines of the preceding case.[5] This and following cases may have some weight in determining the "intention" of the parties under the amendment to the constitution.

Whether stocks are, or are not, to be "immediately delivered" is a question of fact to be determined by the surrounding circumstances and the conduct of the parties in reference thereto, rather than by what they may have termed it, or the form of entries upon books,

[3] Cashman v. Root, 89 Cal. 373, 23 Am. St. Rep. 482, 12 L. R. A. 511, 26 Pac. 883; affirmed in Wetmore v. Barrett, 103 Cal. 246, 37 Pac. 140.

[4] These quotations were quoted with approval in Stillwell v. Cutter, 146 Cal. 657, 80 Pac. 1071; Parker v. Otis, 130 Cal. 322, 326, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

[5] Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393.

and that fact is to be determined by the trial court from the evidence, the same as any other fact, notwithstanding in this case, like in the preceding one, there was a written contract between the parties attempting to give it a certain character.[6]

This provision of the constitution is remedial, not penal, and is not in conflict with the federal constitution, and is not to be so construed as to permit an evasion of it; it is as much the duty of the court to see that it is not evaded as that it is not directly violated; it is not the form of the transaction but the end to be attained; and the validity of the agency is not material in a suit to recover money by an undisclosed principal.[7] It was also said, in denying a nonsuit, that entries in the books of account, such as "200 Kentuck," "100 Yellow Jacket," etc., were sufficient proof that stocks or shares of "incorporated companies" were the subject of the transactions.

It has repeatedly been said by the courts that they "will always see that legitimate business transactions are not brought under the ban."

The first case to arise, where the amendment of 1908 was considered, presented the question whether the repeal of the former clause had the effect of making valid any transactions made before it took effect, and the court held that it did not, but the right to recover

[6] Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362. See, also, Baldwin v. Zadig, 104 Cal. 594, 38 Pac. 363, 722; Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 369, 385, 41 Pac. 308; Stillwell v. Cutter, 146 Cal. 657, 80 Pac. 1071. Evidence held sufficient to show a sale upon "margin," Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911. As to accord and satisfaction in settlement of such accounts, see Rued v. Cooper, 119 Cal. 463, 51 Pac. 704; cited in Maurer v. King, 127 Cal. 114, 118, 59 Pac. 290.

[7] Parker v. Otis, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927, and cases cited.

any money paid on account of them was lost,[8] although the customer could recover stocks owned and pledged by him on other void contracts with the broker, as such stocks were so held without authority of law.

This section of the constitution, amended as it now stands, makes dealings with stock brokers and transactions on stock exchanges quite safe, so far as their legality is concerned. The intentions not to take, and not to deliver, the stock must both exist; if either party had no such intention, but the other did intend to perform his part of the transaction, the contract is valid.

[8] Willcox v. Edwards, 162 Cal. 455, Ann. Cas. 1913C, 1392, 123 Pac. 276. A still later case came up, but the pleadings not raising any question of the invalidity of the contract, and, there being no findings by the lower court on the question, the supreme court declined to consider it, Potts v. Paxton, 171 Cal. —, 153 Pac. 957.

CHAPTER XVI

STOCKHOLDER'S LIABILITY

Article 12, section 3, of the constitution is as follows:

> § 3. Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities
>
> Contracted or incurred, during the time he was a stockholder,
>
> As the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association.
>
> The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee.
>
> Nothing in the preceding paragraph of this section shall be held to apply to any exposition company organized to promote and carry on any international exposition or world's fair within the state of California, and the liability of stockholders in any such exposition company shall be and the same is hereby limited to an amount not exceeding the par value of the stock of said corporation subscribed for by such stockholders. (Amendment adopted November 3, 1908.)

The above provision of the constitution "refers to the direct personal liability of the stockholder to the creditor, and not to the relations existing between the corporation and its stockholders";[1] said in a case where the corporation sold its stock upon an agreement that it should be non-assessable.

[1] Lum v. American Wheel etc. Co., 165 Cal. 657, 661, Ann Cas. 1915A, 816, 133 Pac. 303.

Section 322 of the Civil Code is as follows:

§ 322. Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation.

Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith.

If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it must be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him.

The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock.

The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock.

Trust funds in the hands of a guardian, or trustee, are not liable under the provisions of this section, by

reason of any such investment; nor must the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period.

Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability.

In a corporation having no capital stock, each member is individually and personally liable for an equal share of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered.

The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state. (Amended March 20, 1905, Stats. 1905, p. 396.)

The proviso contained in the sixth subdivision of section 290 of the Civil Code, to the effect that no distinction as to stockholder's liability shall be created between preferred and common stock, is as follows:

Provided, however, that no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation.

The stockholder's liability under the code is substantially the same as under the constitution,[2] and the legislature can not exempt the stockholder of any corporation (in this case savings banks) from this constitutional liability.[3]

A liability of stockholders for the debts of a corporation organized under the laws of the state of California, independent of the liability of the stockholder upon his stock subscription, has existed in this state from the beginning to this day. The first constitution of the state (of 1849, article 4, section 36) declaring such a liability, was identical with article 12, section 3, of the present constitution down to and including the word "liabilities." The remainder of the present section of the constitution was added in 1879.

Neither is it within the power of the courts to declare any exemption from this liability.[4]

The Civil Code, section 322, follows the language of the constitution in declaring the liability and concludes with provisions which have been interpreted as a procedure for enforcing that liability, and not as shifting the same about as between stockholders and creditors, which has been contended was its effect. This will be made more clear by the perusal of the case of Gardiner v. Bank of Napa, 160 Cal. 577, 117 Pac. 667.

At and before the adoption of the constitution of 1849, similar provisions were not uncommon in many other states, but states having such liability laws began repealing them (the last being Kansas and Ohio, which imposed no general liability, but only what was called

2 Bidwell v. Babcock, 87 Cal. 29, 32, 25 Pac. 752; Harmon v. Page, 62 Cal. 448.

3 McGowan v. McDonald, 111 Cal. 57, 66, 52 Am. St. Rep. 149, 43 Pac. 418.

4 McGowan v. McDonald, 111 Cal. 57, 67, 52 Am. St. Rep. 149, 43 Pac. 418.

a "double liability"), until all of them have disappeared, except in California. It is provided, however, in several states that the incorporators may elect at the time of incorporation to assume such a liability. Nor does such a liability exist in any country in Europe so far as we know, at any rate not in England, France, Spain, or Germany, so that California now stands alone in that respect.

Such a liability is a great obstacle to enterprise and progress; is of slight benefit to any one; drives out most *bona fide* investors; makes such investments largely speculative; works great hardships on persons of small means, and makes investment in such stocks unsafe. Moreover, credit is not really given to the corporation on the financial standing of the mass of the stockholders, for their names are seldom known to the creditors. Most *bona fide* investors are willing to risk a definite sum in an enterprise, but are unwilling to risk all they have in the world. For these, and many other reasons, all other states of the United States and all nations of the world, so far as we know, if they ever had such a law, have repealed it.

No such liability existed at common law.[8]

LIABLE AS PRINCIPAL AND NOT AS SURETY

In a very early case it was said that the stockholder "does not occupy the position of a surety, but that of a principal debtor. His responsibility . . . continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. . . . Members of a corporation, who are answerable personally for the corporate debts and liabilities, stand in the same position, in relation

[8] French v. Teschemaker, 24 Cal. 518; Green v. Beckman, 59 Cal. 545, 548; Terry v. Little, 101 U. S. 216, 25 L. Ed. 864; Larrabee v. Baldwin, 35 Cal. 155.

to the creditors of the corporation, as if they were conducting their business as a common partnership.'"[6]

A creditor is not bound to exhaust his remedies against the corporation before suing the stockholders; nor is the liability of the stockholder dependent on the insolvency of the corporation.[7]

The fact that the corporation has conveyed property to the creditor to secure the debt, which property is yet undisposed of, is no defense to a suit by the same creditor against the stockholder to recover his proportionate part of the debt; the stockholders are not sureties as regards the creditors of the corporation;[8] nor does it matter that the creditor is secured by a mortgage given by the corporation to him,[9] and where the stockholder is also a guarantor of the debt of the corporation, if the judgment against him is less than his stockholder's liability, it is immaterial in what capacity he was held liable by the judgment.[10] This liability may arise not-

6 Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 265. The liability commences and the right of action accrues against the corporation and the stockholders at the same time, Davidson v. Rankin, 34 Cal. 503; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62.

7 Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; In re California Mut. Life Ins. Co., 81 Cal. 364, 368, 22 Pac. 869; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 578, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52. And the failure to make timely service of the summons while an investigation is being carried on to ascertain the total indebtedness of the corporation will be fatal to the suit against the stockholder, Anderson v. Nawa, 25 Cal. App. 151, 143 Pac. 555.

8 Sonoma Valley Bank v. Hill, 59 Cal. 107.

9 Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

10 London & S. F. Bank v. Parrott, 125 Cal. 472-487, 73 Am. St. Rep. 64, 58 Pac. 164.

withstanding the corporation has only a *de facto* existence.[11]

Not only is this liability not of a surety but of a principal,[12] but it is not affected by a suspension of the remedy against the corporation.[13] This remedy does not take away any remedy the creditor has against the corporation,[14] nor is it affected by the fact that the corporation is in the hands of a receiver or that the creditor has received dividends in insolvency proceedings, except that the creditor can not be paid twice for the same debt,[15] and the remedy provided in the Civil Code, section 322, is substantially the same as under the constitution,[16] and is in the proportion which his stock bears to the whole *subscribed* stock.[17]

11 Robinson v. Blood, 151 Cal. 504, 91 Pac. 258.

12 Young v. Rosenbaum, 39 Cal. 646; Sonoma Valley Bank v. Hill, 59 Cal. 107; Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62; Faymonville v. McCollough, 59 Cal. 285; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

13 Young v. Rosenbaum, 39 Cal. 646.

14 Hiller v. Collins, 63 Cal. 235, 239; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 150, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787.

15 Sacramento Bank v. Pacific Bank, 124 Cal. 147, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787; Western Pacific R. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284; Young v. Rosenbaum, 39 Cal. 646.

16 Bidwell v. Babcock, 87 Cal. 29, 32, 25 Pac. 752; McGowan v. McDonald, 111 Cal. 57, 66, 52 Am. St. Rep. 149, 43 Pac. 418.

17 Bidwell v. Babcock, 87 Cal. 29, 32, 25 Pac. 752; Danielson v. Yoakum, 116 Cal. 382, 384, 48 Pac. 322; San Francisco Com. Agency v. Miller, 4 Cal. App. 291, 87 Pac. 630; Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 Pac. 6; Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871. And the complaint must show the total amount subscribed, Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73, not coupling that allegation with the words "issued and outstanding." An ultra vires issue of stock to a party does not constitute him a stockholder.

Until a very recent case much confusion of opinion existed as to whether the creditor could collect the whole of his debt from one stockholder if the amount of that stockholder's liability for all of the debts of the corporation equaled the creditor's claim, or whether the creditor was limited to collecting from the stockholder that fraction of the creditor's claim which would correspond to the fraction which the stockholder's stock would bear to the total amount of stock. The case of Gardiner v. Bank of Napa, 160 Cal. 577 (recently decided), definitely settled that question by adopting the latter rule. This case arose out of failure of the California Safe Deposit and Trust Company, and the effect of this decision was to require the creditor, in order to obtain satisfaction in full for his claim, to bring about 11,000 suits or one suit against 11,000 persons, many of which suits would be for insignificantly small sums; therefore the result of this case will be practically to destroy the efficacy and the value of this constitutional provision in the cases of all corporations where the stockholders are many. This consequence can not be looked upon as an evil, however, for the law itself is generally regarded as harsh, unreasonable and often unconscionable.

An action to recover this proportion is an action upon a contract,[18] the corporation becoming the agent of the stockholders to make contracts and incur liabilities.[19] This liability is not joint and several, but several

[18] Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846, considered with reference to attachments, but see Moore v. Boyd, 74 Cal. 167, 171, 15 Pac. 670; Bliss v. Sneath, 119 Cal. 526, 530, 51 Pac. 848, on statute of limitations. He is not liable strictly on contract, but on the statute, Knowles v. Sandercock, 107 Cal. 629, 638, 40 Pac. 1047.

[19] Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; and as to garnishment, Marshall v. Wentz, — Cal. App.—, 153 Pac. 244; McGowan v. McDonald, 111 Cal. 57, 71, 52 Am. St. Rep. 149, 43 Pac. 418.

in proportion to the amount of stock owned by the stockholder.[20] The indebtedness or liability must have been incurred while the stockholder was such;[21] and setting out the date of a promissory note is not sufficient; there must also be an allegation that the indebtedness represented by the note was then first incurred, or, if earlier incurred, the date when first incurred.[22]

The stockholder is also liable for interest on the debt of the corporation as well as for the principal.[23] Proceedings under the United States bankruptcy act do not stand in the way of enforcing this liability. It is not a corporate asset.[24]

The complaint to enforce the liability of stockholders for the debts of a corporation must state the proportion which the stock, owned by the defendant at the time the debt sued for was incurred, bears to the whole subscribed stock at that time.[25] Stockholders who indorse the corporation's note will be released as such

20 Derby v. Stevens, 64 Cal. 287, 288, 30 Pac. 820; Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; Herman v. Hecht, 116 Cal. 553, 560, 48 Pac. 611; In re California Mut. Life Ins. Co., 81 Cal. 364, 368, 22 Pac. 869; Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427; Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 265. But a joint and several action may be brought against the stockholders, Larrabee v. Baldwin, 35 Cal. 155.

21 Danielson v. Yoakum, 116 Cal. 382, 383, 48 Pac. 322; Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Moore v. Boyd, 74 Cal. 167-174, 15 Pac. 670.

22 Case Plow Works v. Montgomery, 115 Cal. 380, 47 Pac. 108; Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Whitehurst v. Stuart, 129 Cal. 194, 196, 61 Pac. 963; Duke v. Huntington, 130 Cal. 272, 274, 62 Pac. 510; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62.

23 Wells Fargo & Co. v. Enright, 127 Cal. 669, 675, 49 L. R. A. 647, 60 Pac. 439; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

24 Selig v. Hamilton, 234 U. S. 652, 58 L. Ed. 1518, 34 Sup. Ct. 926.

25 Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752; Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 Pac. 6; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942.

by a material alteration of the note, the same as others, for that is a matter of contract, but such discharge does not affect their statutory liability;[26] nor does it affect the liability of the corporation when the alteration was made by its secretary before delivery and it received the proceeds of it.

The estate of a deceased stockholder is liable for the debts of the corporation which were incurred after the death of the stockholder (the estate not yet having been distributed), and the claim need not be first presented for allowance, and suit may be brought against the administrator without joining the heirs;[27] but if the estate has been distributed, and the legatee has accepted the stock, he then becomes personally liable for such debts.

The creditor is not limited to separate suits against the individual stockholders, but may enforce this liability by a bill in equity in the nature of a creditor's bill against all the stockholders; necessarily, of course, for the benefit of all creditors.[28] (See title "Creditor's Bill," on stock subscriptions, *infra.*)

WHO ARE STOCKHOLDERS?

Who are such is not defined in the constitution. Section 322 of the Civil Code, after repeating this provision of the constitution, describes them with some minuteness. It was held under this section that this liability of a party extended not only to all stock which stood in his name upon the books, whether he was the real owner or only a pledgee, but also to all other stock

[26] Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 25, 45 Pac. 12.

[27] Miller & Lux v. Katz, 10 Cal. App. 576, 102 Pac. 946; Western Pacific R. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

[28] Harmon v. Page, 62 Cal. 448; Tatum v. Rosenthal, 95 Cal. 129-134, 29 Am. St. Rep. 97, 30 Pac. 136.

of which he was the real owner although it stood on the books in the name of another.[29] This statute and construction may make two persons liable for the same shares,[30] each in full, so that double the usual amount might be recovered on account of such shares.

It is said by the district court of appeals[31] that "the term 'stockholder' or 'owner,' as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown by the books appears in the name of another. While the latter, though not the owner, may be required to respond to a creditor of the corporation, such liability is based not upon ownership, but upon grounds of estoppel to deny ownership,"[32] and the fact that the corporation has neglected to enter the stockholder's name as such upon its books, or actually to issue the certificates for the shares to the stockholder, does not relieve him from liability. This rule might, in a possible case where all the stock stood in the names of one set of persons but was really owned by another set, make the liability double the amount of the debt. It was held in this case that a stockholder could show that stock had been sold and paid for, though not issued, to proportionally diminish his liability, and that no formal contract is necessary to constitute one a stockholder; any agree-

29 Duke v. Huntington, 130 Cal. 272, 274, 62 Pac. 510; Baines v. Babcock, 95 Cal. 581-593, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

30 Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; O'Connor v. Witherby, 111 Cal. 523, 530, 44 Pac. 227; Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

31 Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

32 Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 28, 108 Pac. 871, citing California case. A petition for a rehearing of this case was denied by the supreme court.

ment or act showing such intention on his part is sufficient. The converse of this rule is also true; the stockholder may show, in the absence of estoppel, that the corporate books fail to show the full amount of the holdings of other stockholders.

Where stock was issued to the wife, and stood for three years on the books of the company in her name, although she assigned it two months after its date to her husband, which transfer was not made on the books of the company, the wife was liable as a stockholder for debts contracted during the three years.[33]

It is not a fraud committed on a corporation for its stockholders to conceal their interest in another corporation dealing with it, if they do not control the action of the corporation; as mere stockholders they owed no duty to the corporation.[34]

It has been held where the defendant had given away his stock before the indebtedness was incurred, although it was not transferred on the books of the corporation to the donee, that the original holder was not liable for debts incurred after so parting with the stock.[35] The section reads "each stockholder" is liable, etc., in proportion to the "amount of stock or shares owned by him," etc., and defines "stockholder" as applying to "such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock," etc. Substituting the definition for the word "stockholder" we would have "such persons as appear by the books of the corporation to be such and also every equitable owner of stock" shall be liable for the debts of the corporation contracted "during the time he was [such] a stockholder as the amount of stocks or shares *owned* by him bears to the whole

[33] Abbott v. Jack, 136 Cal. 510, 513, 69 Pac. 257.

[34] Fox v. Mackay, 125 Cal. 54-64, 57 Pac. 670, 672.

[35] Moore v. Boyd, 74 Cal. 167-174, 15 Pac. 670.

subscribed capital stock." Such an interpretation based upon ownership would prevent two persons being liable on account of the same shares, and would make the purchaser (the equitable owner) who had not had the shares transferred to his own name, liable as he should be, instead of the vendor, or both of them. But the rule is different as to assessments,[36] on unpaid stock; there only the registered holder is liable.

Section 298 of the Civil Code is as follows:

> § 298. The owners of shares in a corporation which has a capital stock are called stockholders. If a corporation has no capital stock, the corporators and their successors are called members.

The court says[37] that this section "does not need or admit of the construction that only those are stockholders who are owners of stock. This section does not purport to be a definition of the term 'stockholder' or to limit its extent as would have been the case if it had said that stockholders are those who own stock in a corporation, but is consistent with holding that others may be stockholders than merely those who are the owners of stock" and holding that the registered holder is the stockholder although some other person may be the real owner. This reasoning increases the difficulty, for whatever may be the status of other persons, this section declares that the owners of shares are stockholders and if so this decision adds another stockholder for the same share.

In a case lately decided by the supreme court (Western Pacific R. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284) that court says the word

[36] Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

[37] Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 593, 56 Am. St. Rep. 119, 35 L. R. A. 309, 47 Pac. 582. Section cited in Market St. Ry. Co. v. Hellman, 109 Cal. 571, 588, 42 Pac. 225.

"stockholder" in the constitution bears the "common-sense meaning" which arises in the mind of "the layman," and that "owner" and "stockholder," when applied to corporation stock, are "synonymous," and add that it would not be within the power of the legislature to limit the meaning of the word "stockholder," but says, further, that it appears to have been the purpose of that body to *enlarge* the term to include others not otherwise included therein.

If one hold stock as pledgee, but has the stock transferred on the books of the company to his name, he is liable.[38] But where the stock is transferred on the books to a party who was a pledgee, without describing him as such, and without the knowledge of the pledgee, who, on discovering the fact, demanded that the proper correction be made, but it was not done, the pledgee was not liable.[39] Nor if the pledgee has the transfer properly noted on the books as a pledge is he liable.[40]

There is a material difference between the liability of a person in whose name as trustee stocks stand on the books of a corporation, and the liability of such a party to assessment under section 331 of the Civil Code. In the former he is not liable if he merely holds the title

38 Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734; People's Home Savings Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329; see Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73.

39 Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Shattuck & Desmond W. Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348. Nor can a person be made a stockholder in this manner without his consent, Mudgett v. Horrell, 33 Cal. 25. The statute is construed to mean those who knowingly and willingly permit their names to appear on the books of the corporation as stockholders. Query: How would this rule affect the assignor of a stock certificate where the assignee failed to have the transfer to himself entered upon the books of the corporation?

40 Borland v. Nevada Bank, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

as trustee for another, and it is not actually trust funds so invested by him, but under section 331 of the Civil Code he is liable to be assessed by the directors to pay the debts of the corporation.

A stockholder appeared upon the books of the company as "M. Williard, Trustee for Alfred Williard." The court says that the nature of the trust between the parties is not disclosed, that M. Williard is the one entitled to recognition as a stockholder by the company, and by the other stockholders for voting purposes and to receive dividends, and he is the legal owner of the stock, and the legal owner of the stock is liable for assessments levied to pay up the stock in full. The action was not one upon the statutory liability of a stockholder to the creditor of a corporation which the court says rests upon different principles.[41]

The term stockholder applies not only to all persons who appear by the books to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another; also to all persons who have advanced the purchase money of stock in the name of a minor, so long as the latter remains a minor; also to every guardian or trustee who voluntarily invests any trust funds in the stock, and the trust funds in the hands of such persons are not liable.

But a person who holds stock as collateral security (if he does not transfer it to his own name), or a trustee or representative in any other capacity, except as above stated, is not such a stockholder, but a pledgor or the person or estate represented is such stockholder.

A suit against a number of stockholders on their statutory liability may develop many diverse issues and

41 Union Savings Bank v. Willard, 4 Cal. App. 690, 693, 88 Pac. 1098. In a very early case it was said that the trust must be something more than implied; it must be an express trust, Wolf v. St. Louis etc. Water Co., 15 Cal. 319.

as many trials may be had, and entering default and judgment against one defendant does not operate as a dismissal to the defendants who have answered.[42] The superior court has no jurisdiction of a case where the amount recoverable against the stockholder is less than $300.[43]

The courts have also said[44] "it has been determined by the decisions of this court interpreting these provisions (Civil Code, sec. 324) that, even without entry upon the books of the corporation, such a transfer is valid against all but innocent purchasers and transferees in good faith, for value and without notice," and concerning the necessity of the transfer on the books of the corporation, probably *dictum* only, "but, ordinarily, the rule goes no further than to protect the corporation in paying dividends to a recorded stockholder, in the absence of notice of transfer or other right."[45] It can not be said that a party owns stock which he has sold and indorsed and delivered, although certain consequences adverse to him may result from failure to transfer the same on the books of the corporation.

It was said that the signing of an agreement before the corporation is organized to take stock does not constitute a person a stockholder in the sense of making him liable for assessments levied after the corporation is organized,[46] but, without overruling this case, it was

[42] Grimwood v. Barry, 118 Cal. 274, 50 Pac. 430.

[43] Myers v. Sierra Val. etc. Ass'n, 122 Cal. 669, 672, 55 Pac. 689; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820.

[44] Spreckels v. Nevada Bank, 113 Cal. 272, 276, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329, and cases cited; Manning v. App Consol. etc. Min. Co., 171 Cal. —; 154 Pac. 301.

[45] Ashton v. Zella Mining Co., 134 Cal. 408, 410, 66 Pac. 494.

[46] Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123.

later said such an agreement was enforceable,[47] but not if the corporation subsequently formed differed materially from the one proposed in the agreement of subscription. Nor is it necessary that the stockholders be original subscribers, or indeed subscribers at all if they own the stock, in order to make them liable.[48]

But, as between the corporation and the stockholder, the relationship does not arise until, under section 324, the stock has been transferred on the books of the corporation to the stockholder. An heir of a stockholder to whom the court distributes a stock of a deceased stockholder does not become a stockholder for the purposes of assessment by the corporation until the stock has been transferred to him under section 334;[49] but a different rule applies under section 322 as to the liability of stockholders to the creditors of the corporation.

WHAT STOCKHOLDERS LIABLE?

This topic is so much involved in the questions of "Who Are Stockholders?" *(supra)* and of "Limitations of Actions," *(infra)* of this general subject of "Liability of Stockholders," that reference is made to them for many decisions on this question.

47 Marysville Electric L. etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126, s. c. 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016; California Sugar Mfg. Co. v. Schafer, 57 Cal. 396; Hanford Mercantile Store v. Sowlveere, 11 Cal. App. 261, 104 Pac. 708, in which case it was said a subscription to a corporation to be organized to do a "merchandising business, etc.," is not binding if the powers of the corporation when organized included also the right to deal in real estate, and that "etc." is meaningless in the absence of proof of what was intended by the term.

48 Tulare Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

49 People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280; Western Pacific R. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B, 825, 136 Pac. 284.

Much importance is attached to the definition of the word "liability"; and it is now settled law that those who were stockholders at the time the liability was incurred (that is, at the time of the making of the contract) are the only ones who are liable, although other persons may constitute the stockholders at the time the debt is created (that is, at the time of the actual delivery of the goods).[50] This conclusion is made to rest on the principles announced in Hunt v. Ward[51] and the definition of the word "liability."

But the language of both the constitution and the code is "debts and liabilities"—in the conjunctive, not the disjunctive. The Johnson case[52] limited this liability to one class, and the later Wentworth case to another—both in the disjunctive. There is, however, no difficulty in interpreting the constitution in accordance with the simplicity of its language—that is, by declaring all of both classes liable, one on the "liability" and the other on the "debt." This would avoid the statute of limitations operating as a release of every one when the performance was deferred more than three years, and new stockholders could not complain, for they would become such, knowing of the existence of the executory contract. There could be no double liability, for "each stockholder" pays in the proportion which the stock owned by him bears to the total subscribed stock; if other stockholders do not pay, or pay less than their proportion, or he pays more, he

[50] Coulter Dry Goods Co. v. Wentworth, 171 Cal. —, 153 Pac. 939. Overruling same case in district court of appeal, 18 Cal. App. Dec. 161, and their own decision in bank of April 10, 1915, where an effort was made to save the doctrine of the Johnson v. Bank case, but by a divided court.

[51] Hunt v. Ward, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335.

[52] Johnson v. Bank of Lake, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664.

has the right to call upon them for contribution as will be seen under that heading, *infra.*

If two-thirds of the stockholders did not assent to the creation of a bonded indebtedness, as required by Civil Code, section 359, the stockholders are not liable for such bonded indebtedness,[53] although, if the corporation received a *bona fide* valuable consideration for them, the bonds are valid as to the corporation.[54]

MEASURE OF LIABILITY

It will also be observed that the constitutional provision makes the stockholder liable for the debts of the corporation in the proportion which the amount of stock "owned by him" bears to the whole of the subscribed stock.

While the stockholder is liable for such a proportion of the total debts of the corporation, incurred while he was a stockholder, as his stock bears to the total subscribed stock, the extent of his liability to the vigilant creditor who sues him to recover the amount due upon this liability for many years had never been free from doubt. This question has been put finally to rest in a recent case[55] where the supreme court holds that each stockholder is liable for that fraction of each separate debt of the corporation, incurred while he was a stockholder, which his stock bears to the whole of the subscribed capital. In reaching this decision, the court ignores the fact that the legislature in 1873 added to the first sentence of Civil Code, section 322, the words "and for a like proportion only of *each* debt or claim against the corporation," and in 1905 *repealed* that

[53] Boyd v. Heron, 125 Cal. 453, 58 Pac. 64. This section does not apply to Public Utility Corporations. Moss v. Smith, 172 Cal. —, 155 Pac. 90; but this case has been appealed to the U. S. Supreme Court where it is now pending.

[54] McKee v. Title Ins. etc. Co., 159 Cal. 206, 223, 113 Pac. 140.

[55] Gardiner v. Bank of Napa, 160 Cal. 577, 117 Pac. 667.

clause. It also supports its conclusion by the statement that the constitution "fixes the liability" while the code section provides "the manner of enforcing the rights," ignoring the fact that the construction put upon the code section (while not disturbing the rights of the stockholder as to the total amount of his liability) may disturb, enormously change, increase or diminish the substantive rights of the individual creditor, and for practical and remedial purposes render them almost worthless, as it did in that particular case. If the constitution "fixes the liability" the legislature may provide the means of collecting the claims but, under the guise of such legislation, may not change the measure of them. For that reason the code section ought not (really can not) be considered in determining the meaning of the constitution, as to the amount which a particular creditor may recover of a particular stockholder.

CORPORATIONS WITHOUT STOCK

In corporations of this character the measure of the liability of each member is fixed by this statute at his proportionate share of the total debts (probably of only those contracted while he was a member).

If a member pays more of the debts than he is liable for under the provisions of this section, without authority therefor from the corporation, it is a voluntary payment on his part and he can not recover the excess from the corporation.[56]

CONTRIBUTION

In Larrabee v. Baldwin it was also said that the stockholder may sue his co-stockholders for contribution, if they also have not discharged their liability by themselves paying the necessary amount of the debts

[56] Upton v. Woman's Club of Kern, 19 Cal. App. 127, 124 Pac. 858.

of the corporation.[57] It has also been held that when a stockholder pays not only the whole of his liability to a creditor but a still further sum in order to satisfy the debt, in a legitimate and fair effort to protect his own interest as a stockholder in the corporate property, he is entitled to contribution from the other stockholders to the extent of their liability for the debt paid, and also to be subrogated to the rights and remedies of the creditor as a necessary means of enforcing such contribution.[58] Without citation, or consideration of the above case, the court of appeals, in a case of a corporation without capital stock, where one of the members paid the whole debt and brought suit against other members for contribution, held that the plaintiff was not entitled to contribution on the ground that she was liable for her share only and not for the whole debt.[59] But if the corporation possessed property which might be taken on execution (as most of such clubs do) it would seem to come within the principles of the above case; and, further, a judgment upon the corporation debt would prevent the corporation acquiring the property usually found convenient and necessary for carrying on its affairs, until the whole debt was paid.

An action by one stockholder against another to compel him to contribute upon a note of the corporation upon which both were sureties which the former has paid does not arise out of the relation of suretyship, but is purely statutory, under section 322 of the Civil Code.[60]

But where the corporation is indebted at the time stock is transferred on the books of the corporation to

57 Larrabee v. Baldwin, 35 Cal. 155.

58 Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

59 Upton v. Woman's Club, 19 Cal. App. 127, 124 Pac. 858.

60 Myers v. Sierra Val. Stock etc. Ass'n, 122 Cal. 669, 672, 55 Pac. 689.

the purchaser, if the purchaser pay those debts, not being liable therefor, it is a voluntary payment, and he can not recover the amount so paid from his vendor.[61]

A payment of a judgment against the corporation by a stockholder will not satisfy a liability of the stockholder for unpaid portions on the capital stock owned or subscribed for by him.[62]

RELEASE OF LIABILITY

From very early times it has been declared in this state that persons contracting with a corporation may waive the right to hold the stockholders to their constitutional and statutory liability. The court said[63] that liability was no more a matter of public policy or public concern than the liability of partners, and is only for the benefit of persons dealing with the corporation. In a later case,[64] citing that case as authority, the court said, "that this may be done there can be no question."

Citing these decisions as authority on principle, it has quite recently been decided by the supreme court that an agreement contained in the Articles of Incorporation that the stock shall not be assessed after it is paid in full is valid between the stockholders and the corporation, no rights of creditors being involved.[65] It is possible that this decision enables stockholders in

61 Danielson v. Yoakum, 116 Cal. 382-384, 48 Pac. 322.

62 Union Sav. Bank v. Leiter, 145 Cal. 696-710, 79 Pac. 441.

63 French v. Teschemaker, 24 Cal. 518-558. It was said in Prince v. Lynch, 38 Cal. 528, 532, 99 Am. Dec. 427, that a release of the stockholder released the corporation, but this case has never been cited or approved on that point.

64 Wells v. Black, 117 Cal. 157, 161, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; Kohn v. Sacramento etc. R. Co., 168 Cal. 1, 141 Pac. 626.

65 Lum v. American Wheel etc. Co., 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303.

this manner to remove all liability to assessment for any purpose (except where the stock is not full-paid), thus leaving creditors only the personal liability of stockholders provided by the constitution in addition to the assets of the corporation. But if the stock is not "full-paid" it may be assessed up to par for the benefit of creditors.[66]

Following this decision, the district court of appeals held that a representation that the stock was not assessable, made by an agent in selling the stock, bound the corporation, and that if such representations were not true in point of fact the purchaser could rescind his purchase.[67]

The above decisions are applicable to both domestic and foreign corporations doing business in this state. It is likely that a large part of all corporations hereafter organized in this state will make their stock nonassessable, and those already organized can do so by amending their charters.

The court of appeals, in another recent case,[68] has gone to the extent of saying that a corporation may release or compromise with subscribers for stock, if they are of doubtful solvency, without the authority of any by-law giving that power, or the unanimous consent of all the stockholders, which action will be valid, both as to the corporation and all other stockholders and future creditors, but will not affect existing creditors. The supreme court denied a rehearing by a divided court.

[66] Citing O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 55, 97 Pac. 1; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441, and cases cited.

[67] Browne v. San Gabriel River etc. Co., 22 Cal. App. 682, 136 Pac. 542, 544.

[68] Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 117 Pac. 1041, 1046.

FOREIGN CORPORATIONS, LIABILITY OF CALIFORNIA STOCKHOLDERS

If the liability of a stockholder for the debts of the company under the laws of another state are simple and not inseparably connected with the remedy, it may be enforced in this state, as was done with the former Kansas "double-liability" provision,[69] but it will not be enforced if that remedy is exclusive and the same remedy is not provided in this state.[70]

In the absence of any statement in the pleadings as to the provisions of the laws of another state in regard to the liability of stockholders for the debts of the corporation, it will be presumed that they are the same as in this state. An action may be brought in this state against the stockholders of a foreign corporation to subject unpaid subscriptions to the payment of a debt of the corporation, the presumption being, in the absence of proof, that the laws of the foreign state are the same as the laws of this state, and no call or assessment by the directors is necessary.[71]

Where the Articles of Incorporation declare that it is the purpose of the corporation to do business in California, the stockholders are liable for the debts of the corporation incurred in the state of California. The court rests its decision entirely upon Pinney v. Nelson, 183 U. S. 144, 145, 46 L. Ed. 125, 22 Sup. Ct. 52. The latter case (a Colorado corporation) rested upon the California constitutional provision that no foreign corporation shall be allowed to transact business within this state "on more favorable conditions than are pre-

[69] Ferguson v. Sherman, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023.

[70] Russell v. Pacific Ry. Co., 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; see Miller v. Lane, 160 Cal. 90, 116 Pac. 58.

[71] Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204; Rideout v. National Homestead Assn., 14 Cal. App. 349, 112 Pac. 192.

scribed by law to similar corporations organized under the laws of this state" (art. 12, sec. 15), and the fact that the Articles of Incorporation expressly provided that the corporation was to conduct business in California. The supreme court of the United States, in the concluding paragraph of its opinion, expressly states that this decision is not to be understood as deciding that the stockholders of a corporation would be liable in such a case if the Articles did not expressly provide that it should do business in California, for that was not the case before the court.[72] This does not give the directors power to assess the stock of such a corporation for the general purposes of the corporation.

It is also declared that a judgment creditor of a foreign corporation may sue a stockholder in this state for the unpaid portion of his subscription, there being no showing that the laws of the foreign state are different from those of this state.[73]

In view of the eminence of the courts reaching these conclusions it would seem to be a vain labor, if not presumptuous, to consider or discuss the foundation upon which these decisions rest. But the Dartmouth College and Dred Scott cases were decided by our highest court. It is stretching the words of a statute to remarkable length to say that prohibiting a corporation from "transacting business on more favorable con-

[72] Pinney v. Nelson, 183 U. S. 144, 145, 46 L. Ed. 125, 22 Sup. Ct. 52; Peck v. Noee, 154 Cal. 351, 97 Pac. 865; affirmed, where the Articles of Incorporation of an Arizona corporation expressly provided that it should do a part of its business in California, citing Pinney v. Nelson, supra, and the above constitutional provision, and section 322 of the Civil Code. Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942, s. c. 16 Cal. App. 403, 414, 117 Pac. 1041, 1046; also Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204; Thomas v. Matthiessen, 192 Fed. 495, 113 C. C. A. 101 (against). Reversed 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. 312.

[73] Daggett v. Southwest Packing Co., 155 Cal. 762, 765, 103 Pac. 204.

ditions" than another corporation involves more than "conditions" which affect the corporation itself.

"More favorable conditions for a foreign corporation" properly refers to such things as exemption from requirements, and limitations imposed upon or permitting them to do kinds of business not allowed to domestic corporations, or lower license fees, and many other things which are obvious. To give those words any other meaning destroys them and substitutes something else for them. Courts generally refuse to do that.

The stockholders do not "transact business" anywhere; it is the corporation. The law of the state where the corporation was created, and the Articles of Incorporation signed by the stockholder, constitute the contract of the stockholder; if they provided that he should not be liable for the debts of the corporation, that was a lawful contract; to make it anything else is to substitute a contract which he did not make for the one which he made.

But the courts of this state have repeatedly said that this liability is one of contract, except as to the statute of limitations where it is called statutory. The object of holding this obligation one of contract was to hold stockholders of California corporations, residing out of the state, liable; for, if it were not held to be contractual the courts of other states, under familiar principles, would hold the obligation to be a statutory penalty of the state making it, which would not be enforced outside of its borders. But the truth is that if any burdens are imposed upon him anywhere else that the corporation may do some business, that burden is statutory, not contractual.

The rule that the stockholders can do no business is made unusually strict in California by the statutes and decisions of our courts; both declare that the directors

only can transact the business of a corporation, and that the stockholders have no control over them, and that they can do absolutely no business of the corporation. It is true that their consent is necessary for some things to be done but it is only a consent; even in those matters the directors must first exercise their discretion, and the stockholders can not legally ratify the transaction without such previous action by the directors.[74]

To say that the corporation or directors or the officers are the agents or representatives of the stockholders, and therefore the latter are personally liable for the acts of the former over whom they have no control, may be compared to holding that an inhabitant of a city shall be personally liable for the acts of the city, or of the council, or of its officers. One statement is as logical as the other, and declares quite as much justice. No precedent is or can be cited or relied upon to sustain it; it is contrary to recognized principles; it does violence to the English language; it is no more than a blundering exercise of the will, and only sightless eyes can admire.

If the state be unwilling that foreign corporations, whose stockholders are not liable for their debts, should do business in the state, it may exclude them, except so far as they engage in interstate commerce.

Again, the question may be raised whether this provision of our laws and constitution is not itself in violation of the constitution of the United States, because it imposes burdens or restrictions on interstate commerce quite as much, and far more dangerous than requiring the payment of the same fee for filing their

74 Curtin v. Salmon River etc. Co., 130 Cal. 345, 348, 80 Am. St. Rep. 132, 62 Pac. 552, s. c. 141 Cal. 308, 310, 99 Am. St. Rep. 75, 74 Pac. 851.

Articles and doing business here as is required of domestic corporations. See chapter on "Foreign Corporations," to the effect that such filing fees may be unconstitutional.

TWO LIABILITIES, ONE GENERAL TO PAY UP STOCK TO PAR, AND ANOTHER UNDER THE CONSTITUTION AND CODE

Two liabilities of a stockholder on account of debts of the corporation exist: One to pay up his stock to par, if necessary (whether he subscribed for it or not), and another under the constitution, article 12, section 3, and under Civil Code, section 322, for his proportion of the debts of the company; they are concurrent,[75] and the pendency of a suit to enforce one liability is not a bar to a suit to enforce the other; the liabilities are several, and equity will compel a stockholder to pay up his subscriptions in full in case the corporation is insolvent, and the corporation is a proper but not indispensable party.

CAPITAL AND SUBSCRIPTIONS A TRUST FUND— UNPAID SUBSCRIPTIONS

That the capital stock of a corporation, which includes the unpaid portion on stock subscriptions, is a

[75] Sacramento Bank v. Pacific Bank, 124 Cal. 147-150, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Baines v. Babcock, 95 Cal. 581, 589, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Harmon v. Page, 62 Cal. 448; and the provision for the directors assessing the stock for payment of debts does not take the place of either of these liabilities, Walter v. Merced etc. Ass'n, 126 Cal. 582, 586, 59 Pac. 136; Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Blood v. La Serena etc. Co., 150 Cal. 764, 768, 89 Pac. 1090; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611.

"trust fund" is well established in this state.[76] The term "trust fund" very inaccurately describes its character and is an unfortunate definition; indeed, this fund, if it may be called a fund, has very few of the characteristics of a trust fund. The doctrine grows more and more in disfavor, and its principal support now is the supreme court of the United States, where it originated, and even that court is limiting it from time to time. Our own supreme court has said: "The capital stock is the sole basis of credit. The shareholders, therefore, while entitled to all profits, have no right to the capital until all the creditors have been paid. . . . It (the corporation) is not at all hampered by the idea that it holds its assets in trust for creditors. But when it has ceased to be a going concern and its assets are to be divided, then the claim of creditors is prior to that of stockholders." This is the full extent to which it may be called a trust fund. Unpaid subscriptions to stock constitute a part of the assets and of this fund.

It was further declared in the Vermont Marble case that "public policy requires that the fact whether a particular creditor did trust the corporation on that basis [the liability to pay up stock to par, and the financial ability of the stockholders to meet their general statutory liability] should not be inquired into." But "public policy," so-called, is the highest of all laws; against it all agencies of government are of no effect. There should then be some form of declaring it by the people, rather than that it should be discovered in the cloister, and be declared by the courts, from whose

[76] Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 583-4, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Perkins v. Cowles, 157 Cal. 625, 633, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711, and cases cited; Burke v. Maze, 10 Cal. App. 206, 209, 101 Pac. 438, 440; Merchants' Mutual etc. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091.

declarations there is no appeal. In a very recent case, however, the court says that the above question as to "public policy" in the Vermont Marble case "was not necessary to the decision of the case."[77]

An early case declared that where a creditor releases a stockholder from personal liability, he thereby discharges the corporation,[78] resting the decision upon the ground that as between the corporation and the stockholders the obligation in its legal incidents is joint and several. But the liability of stockholders to the creditors is not joint but several.[79] While the liability of the stockholder is primary, the amount is determined by the debt of the corporation, and evidence admissible against the corporation to establish the debt is admissible against the stockholder, and a judgment against the corporation is conclusive against the stockholder.[80] A stockholder is entitled to this remedy himself if he is a creditor, and he may sue another stockholder for unpaid subscriptions, and his liability as a stockholder can not be offset against the debt due him, but he must contribute ratably.[81] The fact that the debt is secured

77 R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488.

78 Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427. This case has never been cited or approved on this point.

79 Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Knowles v. Sandercock, 107 Cal. 629, 630, 40 Pac. 1047; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Griffin & Skelly Co. v. Magnolia etc. Co., 107 Cal. 378, 381, 40 Pac. 495.

80 McGowan v. McDonald, 111 Cal. 57-70, 52 Am. St. Rep. 149, 43 Pac. 418; virtually overruling on that point, Neilson v. Crawford, 52 Cal. 248, as stated in San Pedro Lumber Co. v. Reynolds, 121 Cal. 74-85, 53 Pac. 410; Tatum v. Rosenthal, 95 Cal. 129, 132, 29 Am. St. Rep. 97, 30 Pac. 136.

81 Blood v. La Serena Land etc. Co., 150 Cal. 764, 89 Pac. 1090.

by a mortgage which has not been foreclosed is immaterial, the note being due.[82]

The liability of a stockholder to creditors of the corporation for his unpaid subscription is contractual, and is wholly distinct from the statutory liability under section 322 of the Civil Code;[83] it is provable as a debt in the bankruptcy proceedings of the stockholder and his discharge in bankruptcy discharges this liability also.[84] An action may be maintained for the unpaid portion thereof against a transferee, who in fact holds it as a pledge, the books of the corporation not indicating that fact.[85] A transferee takes the stock, no matter what representation may have been made to him as to its being paid up, subject to the actual facts in that respect, and if it is not paid in full, is liable to the creditors of the corporation for the unpaid balance on the stock.[86]

A bankruptcy court undoubtedly has the same power to levy assessments on the stockholders of an insolvent corporation as does a court of equity. But where stock in an insolvent corporation has not been paid in full, the holder is liable only for his *pro rata* share of the corporate debts after the assets of the corporation have been exhausted, and, further, until that share is ascertained by the court the trustee in bankruptcy can not sell the unpaid balance on the subscription; such an assignee can not maintain a suit against the stockholder,[87] nor can the superintendent of banks sue the

[82] Knowles v. Sandercock, 107 Cal. 629, 641, 40 Pac. 1047.

[83] Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098.

[84] Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440.

[85] People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329.

[86] Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711, and many cases cited.

[87] Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

stockholders of an insolvent bank to enforce their statutory liability for the debts of the bank.[87a]

PAYMENT OF DEBTS IN SATISFACTION

When a stockholder has paid his proportion of any debt, or of all debts, he is freed from all liability on that account, but he has no cause of action against any stockholder for money so paid.[88]

The privilege given by Civil Code, section 322, to the stockholder of paying debts of the corporation in discharge of his liability applies only to the statutory liability, and not to his liability upon his unpaid subscription to the stock;[89] the latter is an asset of the corporation, and is payable only to the corporation, or to creditors who may sue the stockholder or seize upon this fund by a creditor's bill. It should be borne in mind that, under the decisions already noted, the stockholder could pay no more on each debt than his liability thereon, and receive credit therefor.

In a case where the unpaid part of the subscription apparently did not arise by reason of alleged overvaluation of property or services given therefor, the rule long prevailing in this state was re-affirmed, that is, that the creditor may sue the stockholder directly for such deficiency, without first demanding that the directors make a call or assessment for such deficiency.[90] The case of Turner v. Fidelity etc., *infra,* was referred to, but only to the extent mentioned in the note, and was neither affirmed, reversed, or distinguished.

87a Williams v. Carver, 171 Cal. —, 154 Pac. 472.

88 Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

89 Welch v. Sargent, 127 Cal. 72, 73-82, 59 Pac. 319; Union Savings Bank v. Leiter, 145 Cal. 696, 710, 79 Pac. 441.

90 Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204.

CREDITOR'S BILLS TO ENFORCE PAYMENT OF SUBSCRIPTIONS

A judgment creditor of the corporation may bring a creditor's bill against stockholders to recover the amount unpaid on the latter's subscription to the stock of the company or the amount unpaid on their shares up to par. It is not necessary that this bill be brought against all stockholders similarly situated. The creditor is not obliged to pro-rate with other creditors who do not join in the bill before judgment.[91]

It is not indispensable that an execution against the corporation be returned *nulla bona* before the creditor may sue the stockholder for the unpaid balance upon either his subscription or purchase of stock from the corporation; it is sufficient if it be shown that the corporation is wholly insolvent and has no other assets out of which the debt may be realized.[92]

In a creditor's bill to enforce payment of unpaid subscriptions the creditor is not entitled to discover from one of the defendants the whereabouts of other defendants in order to serve them with process.[93]

The amount of recovery is limited to the amount owing by the stockholder upon his unpaid stock, and such a creditor's right to recover is not affected by the amount of other debts owing by the corporation and no accounting for that purpose is necessary, nor is it

[91] Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186. As to creditor's bills to enforce the general liability of stockholders, see Harmon v. Page, 62 Cal. 448, and Tatum v. Rosenthal, 95 Cal. 129, 134, 29 Am. St. Rep. 97, 30 Pac. 136. Apparently general creditors will not be allowed to join in a creditor's bill brought by a judgment creditor, but this was dictum, as they made no application to be made plaintiffs until after judgment on the creditor's bill, and the statement was made they were not of the same class; Baines v. West Coast etc. Co., 104 Cal. 1-7, 37 Pac. 767.

[92] Merchants' Mutual Adj. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091.

[93] Union Collection Co. v. Superior Court, 149 Cal. 790, 87 Pac. 1035.

necessary that all the stockholders be made defendants; the obligation of the stockholder is personal and not joint.[94] Each creditor appearing in the action is entitled to a several judgment against each stockholder who is a defendant. Such a stockholder can not prefer one creditor and pay all he owes him alone; it was said in this case that the privilege contained in section 322 of the Civil Code applies only to the statutory liability, but this is now doubtful.[95] The judgment against the corporation, in the absence of fraud, is conclusive against the stockholder; his liability is shown by exhaustion of the remedy against the corporation, such as judgment against the corporation and execution returned *nulla bona*.[96]

Also several stockholders may be joined as defendant in an action to enforce the stockholders' liability declared in section 322 of the Civil Code. In such an action the corporation is not a necessary party.[97]

The right to share in the funds realized in such manner is not limited to those who are creditors only, but applies also to a stockholder who is also a creditor to the extent of his claim, and if he is a surety on a note of the corporation and pays it he may share ratably in the assets of the corporation to the extent of the debt so paid.[98] It was said in one case, where a corporation

94 Walter v. Merced etc. Assn., 126 Cal. 582, 59 Pac. 136; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Blood v. La Serena Land etc. Co., 150 Cal. 764, 89 Pac. 1090, unless there be some special reason therefor.

95 Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; in this case all kinds of creditors seem to have received the benefit of the proceedings. Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776. See Gardiner v. Bank of Napa, 160 Cal. 577, 117 Pac. 667.

96 Baines v. Babcock, 95 Cal. 581, 589, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Baines v. Story, 30 Pac. 777.

97 Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039.

98 Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

and a stockholder were both insolvent, and the stockholder owed the corporation unpaid balances on stock subscription, and the corporation owed him on a promissory note upon which he had brought suit and attached property of the corporation, his attachment will be postponed in equity to subsequent attachments of other creditors.[99]

The remedy given by this section of the code (and by the constitution) furnishes to creditors an additional security and is not intended to diminish the assets of the corporation by releasing the stockholder on his unpaid subscription for stock, or to take away the right of the creditor to resort to a court of equity to compel its payment, and the liability of a stockholder on his unpaid subscription is several and not joint.[100] An action in the nature of a creditor's bill may be maintained directly against the stockholder, on account of his unpaid subscriptions, without the necessity of a previous call being made by the directors, or of a demand upon the directors to make a call; a court of equity would make the call and order the amounts to be paid in, and this will be done even in the case of a foreign corporation.[101]

A creditor of an insolvent corporation has the right to the full dividends declared out of the estate of the insolvent corporation until he is paid in full, notwithstanding he has collected a considerable part of his claim out of individual stockholders.[102]

[99] Kimball v. Richardson etc. Co., 111 Cal. 386, 396, 43 Pac. 1111.

[100] Baines v. Babcock, 95 Cal. 581, 589, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

[101] Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204, overruling Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 136, 83 Pac. 62, 70.

[102] Sacramento Bank v. Pacific Bank, 124 Cal. 147-50, 71 Am. St. Rep. 36, 45 L. R. A. 863, 56 Pac. 787.

The fact that the creditor of the corporation holds certain property of the corporation as a pledge or security for the debts does not prevent the creditor from suing the stockholder,[103] nor that he holds a mortgage of the corporation as security.[104]

A corporation not expressly authorized by its articles to invest its funds in the stock of another, can not do so, and its subscription to such stock is *ultra vires* and void, and it can not become liable as a stockholder to the creditors of the latter corporation.[105]

The creditor may join the stockholders in his suit and bring it in any county where any of the defendants reside, and a defendant residing in a county other than that in which the suit is brought, seeking a change of venue, must show that none of the defendants reside in the county where the suit is brought.[106]

Under a general understanding stockholders subscribed for stock at 50 per cent of par, and later the corporation became insolvent. It was held that a creditor, although he was also a stockholder, could sue the other stockholders for the amount unpaid on their subscriptions, his own liability to be deducted from his claims. Also that stockholders could not repudiate their liability on the ground that stock had been sold to them "not for money paid," none of them having yet paid the full amount of their subscriptions; nor could one of them compel the others to pay up to par as he was a party to the original agreement.[107]

103 Sonoma Valley Bank v. Hill, 59 Cal. 107.

104 Knowles v. Sandercock, 107 Cal. 629, 641-2, 40 Pac. 1047.

105 Knowles v. Sandercock, 107 Cal. 629, 643, 40 Pac. 1047.

106 Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039, s. c. 135 Cal. 154, 67 Pac. 17; County of Modoc v. Madden, 136 Cal. 134, 68 Pac. 491; Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 716, 73 Pac. 588.

107 Richardson v. Chicago Packing etc. Co., 6 Cal. Unrep. 606, 63 Pac. 74.

See, ante, on "Constitution and Fictitious Stock and Bonds."

ASSESSMENT ON SUBSCRIPTIONS

When a corporation is insolvent, it is within the power of the directors, notwithstanding a by-law limiting assessments, to make assessments to the full par value of the subscriptions, in order to pay its debts,[108] collectible only by suit against the stockholders. For assessments in the absence of insolvency, see chapter on "Assessments."

LIABILITY IN CASE OF OVERVALUED PROPERTY OR SERVICES TAKEN IN PAYMENT OF SUBSCRIPTIONS

In a case where a corporation issued stock in payment for services, as full paid, the second district court of appeal said, where there was no showing of fraud, the creditor, having no direct obligation of the stockholder, has no greater right than the corporation to compel the stockholder to pay anything further on the stock for his benefit; if the corporation can not do so, neither can the creditor.[109] It was said in this case, however, that important exceptions had been made to this rule in cases of fraud, actual or constructive as to creditors, by which the stockholder would be estopped from showing the real nature of the contract.

In a quite recent case[110] the third district court of appeal held that a mining corporation giving stock of

108 Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441, citing Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383, and Union Sav. Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084.

109 Turner v. Fidelity Loan Concern, 2 Cal. App. 122-131, 83 Pac. 62, 70. A rehearing of this case was refused by the supreme court, after declaring that so much of the opinion (which followed the above) as pertained to other points mentioned was not "the law of the case" because not concurred in by all appellate justices.

a hundred thousand dollars as an inducement to a party to make a loan of seventy-five thousand dollars, secured by mortgage on the property of the corporation, was not in violation of, or a device to evade, the law. The court said that, at the time of the transaction, the value of the stock, "in so far as such stock might have any actual value . . . was purely tentative, or extremely problematical," and was dependent upon the development of the property which this borrowed money was expected to make, and the issuance of this stock could hardly justify the inference of fraud, either as a matter of law or fact, even if attacked by creditors, and cites many cases in support of that position. It further says, that the constitution does not, in the absence of fraud and on the complaint of a stockholder only, require the consideration to be equal in value to the par value of the stock, and that the word "bonus," in such transactions, does not imply a gift or gratuity. This case is not cited or considered by the supreme court in R. H. Herron Co. v. Shaw cited below, decided about six months later.

In the latter case,[111] the supreme court has gone far in the other direction, extending the doctrine declared in Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057, to cases where the stock is issued for property of less value than the par value of the stock. In that case, the corporation issued the greater part of its stock for "water rights, mining claims and mining machinery," which it knew or believed at that time was worth only about one-tenth of the par value of the stock issued for it. A judgment creditor sued the holder of those shares

110 California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190.

111 R. H. Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488.

for that difference. After saying that so far as the stockholders in their relations to the corporation or to each other are concerned the rule that stock issued for labor, services or property, in the absence of a fraudulent purpose, is full paid is conclusive, adds that no such rule prevails in this state as to creditors. The court says, "it is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties, and as they honestly believe it to be, that determines the liability. . . . The parties may believe that the property will eventually rise to a value far above that at which it is exchanged, and they may willingly accept the hazard in view of the expected gain, but they have no right to demand that the creditor shall share the risk with them." The court adds that it was not necessary in that case to consider "the rule applicable to an innocent purchaser of stock," nor a case where the directors knew that the stock was exchanged at less than the par value of the stock, but the purchaser of the stock honestly believed the values of the stock and the property were equal. The writer knows of no clear rule in such cases yet declared in this state. Of course stockholders, in the absence of actual fraud, can not complain,[112] nor can the corporation, as we have already seen.

The effect of this decision, and the constitutional and statutory provisions, is to subject all of the stockholder's private property, of whatever nature and wherever situated, to the hazards of the business of any corporation in which he becomes a stockholder.

The defect in the Herron decision is the absence of all perspective. Among the many important principles applicable to such cases it ignores all but one; leaves out of consideration human experience; casts aside the

112 Garretson v. Pacific etc. Oil Co., 146 Cal. 184, 79 Pac. 838.

real inducements and considerations, facts and reasons present in the minds of both parties when credit was extended to the corporation, and decides the case solely upon that one abstract principle. As always happens in such cases, the decision is wrong.

Like abnormal disturbances at some point in the earth's atmosphere, this decision raised many contrary winds which carried a later one to as extreme a point in the opposite direction. In Harrison v. Armour[113] 60,000 shares of stock were issued for certain patent rights (which are the favorite foundation of many of the most flagrant instances of issues of "Blue-Sky" stocks, not excepting even mining claims). This patent was for a "wave-motor!" Two days prior to the issue of this stock the corporation authorized the sale of a still larger block at twenty-five per cent of par, and sold some at that price. Nothing occurred during these two days affecting the value of the stock. The court said there was no evidence that the value of the patent rights covering the "wave-motor" was not worth the par value of the 60,000 shares, nor any evidence that the shares "were known or believed by the parties to be worth much less" than par; and that the inference drawn by the court below, from the sale of the stock two days before at twenty-five per cent, that the patent rights were known, or believed, to be worth no more, was unwarranted, and reversed the decision of the lower court.

In the matter of pleading it is said that if the purchaser of shares acquires them under circumstances which would relieve him from liability for the amount unpaid on the shares, it is a matter of defense and must be pleaded and proved.[114]

113 Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166.

114 Ryan v. Jacques, 103 Cal. 280-285, 37 Pac. 186.

A stockholder in an insolvent corporation who transfers his stock to an insolvent person, although prior to the call, in order to escape stockholder's liability, is liable, notwithstanding, for the amount unpaid on his subscription,[115] but if the transferee is solvent he only is responsible;[116] so, also, the transferee only is responsible if the transfer was made before the debts were incurred, if regularly made on the books of the corporation, whether the transferee is solvent or insolvent.

LIMITATION OF ACTIONS AGAINST STOCKHOLDERS AND DIRECTORS

Section 359 of the Code of Civil Procedure is as follows:

> **§ 359.** This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

When Three Years. It was held that this stockholder's liability is one created by law,[117] and is barred three years after the liability was created (not after the cause of action arose); but this should be limited

115 People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; National Carriage Mfg. Co. v. Story, 111 Cal. 531, 44 Pac. 157; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

116 People's Home Sav. Bank v. Sadler, 1 Cal. App. 189-195, 81 Pac. 1029.

117 Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 596, 37 Pac. 499; Hunt v. Ward, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62; Moore v. Boyd, 74 Cal. 167-171, 15 Pac. 670; Green v. Beckman, 59 Cal. 545, to the effect that a suit to recover money had and received by the corporation was reasonably brought if within three years; Coulter Dry Goods Co. v. Wentworth, 172 Cal. —; 153 Pac. 939.

to the question of the statute of limitations, because, for other purposes, this liability is held to be contractual.[118]

It seems quite clear English that the phrase "after discovery" applies to all matters mentioned; the last comma was inserted because a different verb was required in the last clause as penalties and forfeitures are said therein to attach and a liability created by law to arise. There is less reason for extending the limitation on enforcing penalties and forfeitures, which are held in so great disfavor in the law, than on pecuniary liabilities created by law, which are not held in disfavor. To withdraw "discovery" from the facts which give rise to a liability created by law the word "after" should have followed the last "or." But the courts seem to think that "discovery" does not apply to the latter.[119] That this liability is one created by statute was reaffirmed in subsequent cases[120] when the statute of limitations was the question.

There is an expression in one of the earlier cases which would indicate the possibility that the stockholders in existence at the time the new note was

118 Kennedy v. California Sav. Bk., 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; McGowan v. McDonald, 111 Cal. 71, 52 Am. St. Rep. 158; Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 149, 1031; Kiefhaber L. Co. v. Newport L. Co., 15 Cal. App. 40, 113 Pac. 692; Miller & Lux v. Katz, 10 Cal. App. 579, 102 Pac. 947; cited in County etc. v. Gage, 139 Cal. 406, 73 Pac. 174; really dictum in Royal Trust Co. v. MacBean, 168 Cal. 650, 144 Pac. 139. That this liability may be contractual for some purposes, and one created by law, so far as limitation is concerned, cited in a different kind of case, Bliss v. Sneath, 119 Cal. 526, 530, 51 Pac. 848.

119 Royal Trust Co. v. MacBean (really dictum), 168 Cal. 642, 650, 144 Pac. 139; Johnson v. Hinkel, 28 Cal. App. —, 154 Pac. 489; Whitten v. Dabney, 172 Cal. —, 154 Pac. 315.

120 O'Neill v. Quarnstrom, 6 Cal. App. 469, 472, 92 Pac. 391; Royal Trust Co. v. MacBean, 168 Cal. 650, 144 Pac. 139; Johnson v. Hinkel, 28 Cal. App. —, 154 Pac. 489.

executed in renewal of the preceding debt might be liable, on the theory that the new note was the creation of a new debt,[121] but this point does not appear to ever have been alluded to in any subsequent case and of course was *dictum* in that case. But the liability on unpaid subscriptions pertains to the stock, and personality of the ownership of the stock is secondary, incidental; the purchaser is entitled to the elapsed time so far as the statute of limitations is concerned, and is not liable for debts for which the shares could not be made liable in the hands of the former owner, otherwise the purchase would change the character of the shares greatly diminishing their value, which is not intended by the law, nor is it permissible.

It is also held that if a stockholder pays the debt of a corporation, he may be subrogated to the rights of the corporation as against the other stockholders; but the statute of limitations will be the same as it was in favor of the creditor to whose rights he was subrogated, that is three years from the date of the origin of the debt.[121a]

In an early case[122] it was held that in case of an insolvent bank the limitation did not begin to run until its failure, which was a refusal to pay. The court says: "The right of action against the stockholders did not commence sooner. How could it? If on demand the bank had paid and the stockholders were discharged, can it be maintained that there was no right of action against the bank and still one against the stockholders? They are primary debtors co-ordinately responsible, but one is not responsible before the other. . . . The

121 Hyman v. Coleman, 82 Cal. 650, 652, 16 Am. St. Rep. 178, 23 Pac. 62.

121a Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

122 Mitchell v. Beckman, 64 Cal. 117, 121, 28 Pac. 110, cited in Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62.

right of action against the corporation and the stockholders accrues at the same time."

But a later case on this subject, making no reference to this case, established quite a different rule, saying whatever divergence of views may be found in earlier adjudications, Hunt v. Ward and Bank of San Luis Obispo v. Pacific etc. S. S. Co., contain the last expressions of the court upon the question and that the liability of a stockholder in an insolvent savings bank is incurred at the time of each deposit, and the cause is barred as to all deposits made more than three years before the commencement of the action.[123]

A collection was made for a depositor and credited to his account more than three years before suit was brought by the depositor against the stockholders of the bank to recover the same, but who within three years had transferred the account to the savings department of the bank. It was held the latter transaction did not extend the statute of limitations.[124]

Not Extended by Extending Debt. The corporation had no more power to extend the period of limitation as against the stockholders by an open mutual account than by making its promissory note;[125] the statute begins to run from the creation of the original indebt-

123 Wells v. Black, 117 Cal. 157, 163, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75. But if the accounts start with an overdraft subsequent deposits will be construed only as payments on the overdraft, Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 411, 58 Pac. 85. But there is no limitation in favor of a bank on its liability to depositors. Sec. 348, Code Civ. Proc.

124 Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939.

125 Redington v. Cornwell, 90 Cal. 49, 63, 27 Pac. 40; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939, which was a case where a depositor in a bank transferred his deposit from the commercial department to the savings department within three years of bringing the suit.

edness;[126] nor does the fact that an account stated to have been made between the creditor and the corporation, which reduces the debt, alter the fact that the time begins to run from the commencement of the original indebtedness; the stockholder may contest the amount or validity of either. The giving of a new note will not extend the statute of limitations.[127]

At an early date it was decided[128] that the liability of a stockholder is not affected by the suspension of the remedy against the corporation, the application of the rule being when the collection of a judgment was suspended by order of court for one year. But the court also said that the stockholders, not being sureties of the corporation but principal debtors, may perhaps be bound although the debt may be barred as to the corporation. . This position is not supported by the reasoning of the opinion. Nor is the limitation extended as to the stockholder by a judgment against the

126 Partridge v. Butler, 113 Cal. 326, 45 Pac. 678; Nellis v. Pacific Bank, 127 Cal. 166, 59 Pac. 830; Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090. It is not enough to state the date of the note given for the debt; the date of the original indebtedness must be stated, J. I. Case Plow Works v. Montgomery, 115 Cal. 380, 47 Pac. 108; Eva v. Andersen, 166 Cal. 420, 423, 137 Pac. 16. But see Herman v. Hecht, 116 Cal. 553, 48 Pac. 611. Failure to state such date must be raised by demurrer, Whitehurst v. Stuart, 129 Cal. 194, 61 Pac. 963.

127 Goodall v. Jack, 127 Cal. 258, 59 Pac. 575; Jones v. Goldtree Bros. Co., 142 Cal. 383, 385, 77 Pac. 939; London & S. F. Bank v. Parrott, 125 Cal. 472, 474, 73 Am. St. Rep. 64, 58 Pac. 164; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62; Redington v. Cornwell, 90 Cal. 49, 63, 27 Pac. 40; O'Neill v. Quarnstrom, 6 Cal. App. 469, 473, 92 Pac. 391.

128 Young v. Rosenbaum, 39 Cal. 646. This case was cited in Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62, with approval.

corporation,[129] nor does it matter whether the corporation is solvent or insolvent,[130] but whenever the debt is in part satisfied by the corporation, it is satisfied *pro tanto* as to the stockholder.[131] The limitation of section 359 of the Code of Civil Procedure is not in conflict with this section of the constitution; it does not attempt to relieve the stockholder from his liability, but only limits the time within which action may be brought on it, and that is not inconsistent with the constitution;[132] nor is it in conflict with section 309 of the Civil Code, nor with section 348 of the Code of Civil Procedure.

Waiver of Statute. A stockholder may waive the right to plead the statute of limitations in consideration of an agreement on the part of the creditor not to sue for a definite time.[133]

On Subscriptions it Begins With the Call. Where, there being no written subscriptions for stock, the stockholders verbally agreed that the stock should be full paid on payment of twenty per cent on par which was paid, the corporation becoming insolvent, the directors made further calls in order to pay its debts; the statute of limitations did not begin to run on the

129 Stilphen v. Ware, 45 Cal. 110, 111; Hyman v. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. 62.

130 Cutting Packing Co. v. Packer's Exchange, 86 Cal. 574, 579, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52.

131 San Jose Sav. Bank v. Pharis, 58 Cal. 380, 381; Sonoma Valley Bank v. Hill, 59 Cal. 107, 110. But payment by certain stockholders to the president to liquidate their obligation on all the debts does not reduce the debt due from the other stockholders, Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

132 Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 412, 58 Pac. 85. But see remarks of Beatty, C. J., (dictum) in Cook v. Ceas, 143 Cal. 221, 224, 77 Pac. 65. See Johnson v. Hinkel, 28 Cal. App. —, 154 Pac. 487, 489.

133 Wells, Fargo & Co. v. Enright, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

payment of the balance of par until the calls were made.[184] Of course, no stock in an insolvent corporation can be sold under assessment proceedings; suit against the stockholder to recover the amount is the only remedy. See "Assessments."

As to Sureties, and Guarantors. The liability of a stockholder begins with the date of the contract of suretyship, or if indemnity,[185] without regard to the date when the obligation guaranteed shall become due; and suit by the surety against the stockholder, brought more than three years after the execution of the contract of suretyship, is barred by the statute. The court says "the liability does not depend for its existence upon the fact that it is immediately enforceable. It may exist without the right of immediate enforcement"; citing, Hunt v. Ward, 99 Cal. 612, 615, 37 Am. St. Rep. 87, 34 Pac. 335.

But if sureties pay the debt of a corporation, that act creates a new and distinct debt of the corporation, and the statute of limitations does not begin to run against a suit by the sureties against the stockholders until the date of the payment by them,[186] and if the note itself was not barred, even if the payment of the note was made more than three years after its date.[187] This case is unsupported by citation of authority, except generally as to the rights of a surety paying a debt of his principal, which it is obvious is not in all respects

184 Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579-588, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Union Sav. Bank v. Leiter, 145 Cal. 696-703, 79 Pac. 441.

185 First Nat. Bank v. Consolidated Lumber Co., 16 Cal. App. 267, 268, 116 Pac. 680; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16.

186 Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283. In this case the court said that an inevitable result was that the liability of those who were stockholders at the time the note was given was extinguished.

187 Ryland v. Commercial etc. Bank, 127 Cal. 525, 59 Pac. 989.

parallel. Nothing is said as to what class of stockholders would be liable—whether it would be those who existed when the original indebtedness arose and the note was given, or those who were stockholders when the surety paid the debt; logically it should be the latter.

In a later case this point was so decided;[188] the court also declared, as to the rights of sureties in this class of cases, that, the original obligation being so extinguished, upon the surety paying the obligation of the corporation a new cause of action arose, in *assumpsit* in favor of the surety against the stockholder, and that the three-year statute of limitations did not begin to run as to the surety until he had paid the obligation, and that it is those who are stockholders at the time of such payment, and not the stockholders at the time the note was given, who are liable to the surety.

In another case,[189] quite recently decided, we have an illustration of the nicety of distinctions which arise in corporation cases. A corporation was the owner of a promissory note taken by it in the usual course of business which fell due six months after its date. A few days after its date the corporation sold the note and guaranteed its payment. The maker defaulted in payment, as also did the guaranteeing corporation, and more than three years after the date of the sale and guaranty, but less than three years after the maturity of the note, the purchaser sued a stockholder of the guaranteeing corporation on his statutory liability. The court said that the liability of the guaranteeing corporation began on the date of its sale and guaranty

188 Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094; cited as to sureties in other kinds of cases, Loewenthal v. Coonan, 135 Cal. 381, 383, 87 Am. St. Rep. 115, 67 Pac. 324, 1033, 68 Pac. 303.

189 First Nat. Bank v. Consolidated Lumber Co., 16 Cal. App. 267, 268, 116 Pac. 680.

of the note, and therefore the liability of the stockholder arose at the same instant, and that being more than three years before the suit was brought, although less than three years after the maturity of the note, the action was barred.

On Mortgage Debts. The liability of a stockholder for a debt of the corporation secured by mortgage is not limited to the deficiency arising from the foreclosure and sale of the mortgaged property, but is original and primary for the whole debt thereby secured.[140]

Where the purchaser bought stock agreeing to hold the seller "free and harmless from any debts or liabilities of said company, for which he may be obligated or liable as a stockholder," the court said this was not simply an agreement to hold the seller harmless from damages but from debts and liabilities, and that a corporate debt being in existence at the time of the sale of the stock, the seller could immediately sue the purchaser for the amount of the seller's obligation to the creditors of the corporation although the corporation's debt might not yet be due, and this he might do even before he had paid the debt.[141]

On Contracts for Attorney's Services. In a case, now overruled, it was said that the liability of a corporation, and of its stockholders, for the services of an attorney employed to defend a suit is not created until the rendition of the services, and the limitation begins to run from that date and not from the date of the contract of employment.[142]

140 Niles State Bank v. Jennings, 22 Cal. App. 66, 133 Pac. 329.

141 Eva v. Andersen, 166 Cal. 420, 137 Pac. 16.

142 Johnson v. Bank of Lake, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664. Overruled in Coulter Dry Goods Co. v. Wentworth, 171 Cal. —, 153 Pac. 939.

The ruling of this case, as to the point of time when the liability arose, was disapproved and the decision in a later case reversed.[143] Here it was declared that, on a contract to furnish goods to a corporation, the liability of the stockholder began when the contract was made and not when the goods were delivered, and that only the stockholders existing at the time the contract was made were liable; this conclusion was reached by the definition given to the word "liability" as distinguished from "debt." An averment that a corporation became indebted to the plaintiff on a certain day for a balance due on certain work is sufficient in the absence of a special demurrer.[144]

On National Bank Stock. An action to enforce a stockholder's liability on stock of a national bank located in another state is on a liability created by law and under said section 359 is barred three years after it was created.[145]

In Case of Foreign Corporations. In a case of a Colorado banking corporation becoming bankrupt, suit by the creditor's court-appointed representative was brought in this state against a stockholder residing in this state to recover the balance unpaid on his stock subscription. It was held that the three year statute of limitations of this state applied to the suit, and that the statute began to run at least as soon as the creditor's bill to establish the liability of stockholders was filed in Colorado.[146]

143 Coulter Dry Goods Co. v. Wentworth, 171 Cal. —, 153 Pac. 939, on a rehearing in the supreme court of the same case in the district court of appeal (18 Cal. App. Dec. 161) reversing the decision of that court. But see Cutting v. Oliphant, 27 Cal. App. 120, 148 Pac. 940.

144 Duke v. Huntington, 130 Cal. 272, 62 Pac. 510.

145 King v. Armstrong, 9 Cal. App. 368, 99 Pac. 527.

146 Miller v. Lane, 160 Cal. 90, 116 Pac. 58.

The laws of Canada imposed a certain liability on stockholders of bank stocks, arising when the bank became insolvent. In a suit by the liquidator against a stockholder in this state to recover this liability, it was held that our statute of limitations applied, and that the suit was barred three years after the insolvency of the bank—the time when the liability arose—notwithstanding it was not payable under the laws of Canada until a considerable time afterward.[147] The time of the discovery of the facts is immaterial.

Absence From the State is not to be deducted from the limitation provided in this section as in most other cases.[145]

Where Debt Does Not Mature Within Three Years. Where, by the terms of the original obligation, the debt of the corporation does not mature within three years from its date, the question whether the limitation begins to run from the date or the maturity of the obligation presented many difficulties of solution. The most important consequences, on account of the usual magnitude of the obligations, would arise on defaulted bond issues. No case involving liability on bond issues has yet reached the appellate courts. There have been, however, several cases where the date of the original promissory note was more than three years before suit was brought, and suits on a renewal note dated within three years from the commencement of the suit, but renewing notes dated more than three years before the suit. The same principle, which prevents the renewal of a debt extending the limitation, would also prevent accomplishing that end by making the original maturity

147 Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139. Some expressions in Miller v. Lane, 160 Cal. 90, 116 Pac. 58, supra, were said to be obiter. Johnson v. Hinkel, 28 Cal. App. —, 154 Pac. 487, 489.

of the obligation more than three years from the time of the creation of the debt.

The first case of this kind to arise was where a note, secured by a mortgage, fell due one year from its date, but suit was not brought against the stockholder until after three years from the date of the note;[148] for that reason the court held the action was barred under section 359 of the Code of Civil Procedure. The court, commenting on the difference in the language of that section and of other sections of the same code limiting times for bringing actions, says that all other sections provide that the time begins to run when the cause of action accrues, but section 359, in regard to the liability of stockholders, provides that the time begins to run at the time "the liability was created," *ex industria,* emphasizing the distinction between the creation of a cause of action and the accruing of a cause of action. We might add that this view is further emphasized by the provision of the constitution also which declares that those persons shall be liable who were stockholders when the debt or liability was "contracted or incurred." If the rule declared in Hunt v. Ward were not to prevail, the stockholders creating the debt might entirely relieve themselves from responsibility for the payment of the debt, and shift that obligation over to a new set of stockholders, by postponing the maturity of the debt more than three years from the date of its creation. The court, meeting the argument that a note might be given not falling due until one day after three years from its date and that in such a case the statute would have run in favor of the stockholders before any cause of action accrued against them, says this "would

[148] Hunt v. Ward, 99 Cal. 612, 613, 37 Am. St. Rep. 87, 34 Pac. 335. To the same effect also, First Nat. Bank v. Consolidated Lumber Co., 16 Cal. App. 267, 116 Pac. 680 (see the paragraph as to sureties and guarantors for a statement of the case). Cited in McKee v. Title Ins. etc. Co., 159 Cal. 206, 215, 113 Pac. 140.

be the result of the voluntary act of the creditor done in the face of the law . . . if he chooses to make a contract with the corporation, by which its payment of the indebtedness is postponed beyond the three years' limitation in favor of the stockholders, he simply does an act which practically waives his right against the latter—assuming, of course, that his only cause of action against the stockholder is upon the note of the corporation." Of course the assumption was said *obiter,* but on the case decided the logic and the reasoning are faultless and unanswerable. The case presented, and what was actually decided, was that, where the suit was brought within three years from the maturity of the note, but more than three years from its date (the time assumed as the creation of the debt), it was barred by section 359 above.

This rule was affirmed in a case[149] similar in its facts, viz.: The corporation's note was given and dated December 30, 1886, and fell due six months thereafter; suit was brought against the corporation and judgment obtained and execution returned unsatisfied. Afterwards, on April 11, 1890, suit was brought against a stockholder. It will be observed that this was less than three years after the maturity of the note, but more than three years after its date. The court says: "It must now be regarded as settled law in this state that the liability of a stockholder of a corporation to pay his proportion of its corporate debts is one created by statute, and an action to enforce that liability must be brought within three years after the cause of action accrues." (Citing cases.) "In the case (Hunt v. Ward, *supra)* last named it was held that the liability of a

149 Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 Pac. 499. See Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Wells v. Black, 117 Cal. 157, 163, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090.

stockholder of a corporation upon a note given by the corporation is *created* within the meaning of section 359 of the Code of Civil Procedure, at least, as early as the date of the note, and the statute of limitations commences to run in favor of the stockholder from the date of its execution, and not from its maturity, regardless of how long the liability of the corporation to actions may be postponed by agreement of the creditor."

It is not sufficient to allege in the complaint the date of a note without stating when the debt for which it was given was created, for the defendant may not have been a stockholder at the time of the creation of the debt, or may have owned less shares than at the date of the note; nor will a renewal of the note extend the statute.[150]

In a case[151] involving the limitation of a suit on a guardian's bond, the court quotes from Hunt v. Ward, *supra,* and adds, "They do not decide, and of course could not have decided, that in the case supposed there would be no liability on the part of the stockholders; for when the constitution says that stockholders shall be liable for their proportion of *all* debts of the corporation, it is not competent for the legislature to say, directly or indirectly, that they shall be liable for such debts only as mature within three years." This was wholly outside of the case, and can not be called more than a passing remark; it is a *non sequitur* when we consider that the statute is one of procedure only. That

150 Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Goodall v. Jack, 127 Cal. 258, 59 Pac. 575; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Jones v. Goldtree, 142 Cal. 383, — Pac. —; Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62; Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75.

151 Cook v. Ceas, 143 Cal. 221, 224, 77 Pac. 65.

a limitation on the time of bringing a suit to enforce a liability created by statute or a constitution may be provided by the legislature is admitted by the decisions of all courts, everywhere;[152] the constitution does not say they shall be forever liable; such demands may become stale and forgotten as well as others.

It seems clear, when a corporation issues its mortgage bonds maturing at a distant time in the future (more than three years from the date of the creation of the indebtedness), that after three years from the date of the issue no suit can be brought by the bondholder against the stockholder.

Whether the bondholder can bring a suit against the stockholder during the first three years of the existence of the indebtedness has not been decided. If such a case were to be determined by the principles governing ordinary cases where the note or bond is not yet due, there would be no pretense that it could be done. But the courts have repeatedly held that the obligation of the stockholder is not created by the note, but by the statute, and is separate and distinct from the obligation of the corporation, and that the stockholder is in no sense a surety for the corporation. Yet in nearly every sense he is treated as a surety, for if the stockholder is compelled to pay such a debt he may collect what he has paid on that account from the corporation, which is like the remedy given to a surety or guarantor against his principal, and if the corporation pays the debt it can not make the stockholder contribute by reason of that fact (like co-obligors or joint obligors may do), for the debt and every one's obligation is extinguished.

[152] And it is squarely so decided in Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75, supra.

PREFERRED STOCK

No preference or advantage can be given to the holders of preferred stock over the holders of the common stock as to the constitutional and statutory liabilities of the holders thereof to the creditors of the corporation. (Civil Code, sec. 290.) Undoubtedly the same principles as to the obligation to pay the same up to par, so far as creditors are concerned, would apply to the preferred stock as to the common, but that point has not yet been decided by the appellate courts.

CHAPTER XVII

LIABILITY OF DIRECTORS

So much of article 12, section 3, of the constitution as relates to this subject reads as follows:

> The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee.

CONTRACT WAIVING LIABILITY VOID

Section 327 of the Civil Code is as follows:

> § 327. Any contract or contracts, verbal or written, hereafter made whereby it is sought directly or indirectly to relieve any director or trustee of any corporation or joint-stock association from any liability imposed by section three of article twelve of the constitution of California, are hereby declared to be and shall be null and void. (Stats. 1880, p. 9.)

For liability of directors for payment of unearned dividends, creating an excessive debt, etc., see chapter on that subject, Civil Code, section 309.

Directors of a corporation are trustees of the stockholders, and act in a fiduciary capacity to the corporation and its stockholders,[1] and are precluded from making any use of their power as such for their private

[1] Farmers' & Merchants' Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62; Woodroof v. Howes, 88 Cal. 184, 187, 26 Pac. 111; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Wright v. Oroville G. etc. Min. Co., 40 Cal. 20; Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 Pac. 1011, overruling s. c. 6 Cal. Unrep. 540, 62 Pac. 300.

interests. And any officer of a *de facto* corporation is subject to the same liabilities and penalties as like officers of a *de jure* corporation.[2] While in a general way this is the rule everywhere, the strict application of all the rules governing the duties and obligations of a trustee, in the fineness of the lines distinguishing them from other agents and servants, is peculiar to California.

In a suit[3] against the agents and managers of an insurance corporation for moneys paid to them, the court said: Where persons "are acting in good faith, and suppose that they are stockholders in a valid corporation, and where the corporation assumes to transact business for a number of years, and the assumed corporate existence is not challenged by the state, they can not then be held liable as individuals," partners; and this principle shields the members in dealing with themselves. It was also said in this case (although *dictum):* "Where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals."

In the first case arising under this provision it was held that the word "misappropriated" is to be construed by its relation to the other provisions, that it there means "misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials," etc.,[4] and that an action on this account arising from negligence must be brought within two years from the time the cause of action arises and, if out of

[2] People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[3] Perkins v. Fish, 121 Cal. 317-325, 53 Pac. 901.

[4] Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 369-426, 41 Pac. 308.

fraud, within three years from the discovery of the fraud.

An action at law by the creditor will not lie to recover these funds from the director. It can be inforced only by a bill in equity by a creditor in behalf and for the benefit of all creditors;[5] all creditors are entitled to be represented and to share ratably in preference to the rights of the stockholders who may recover in subordination to the rights of the creditors.[6] It was further said that the statute is not penal in a technical sense, but a compensation only for loss. The liability is one of suretyship in which the innocent suffer for the guilty, and therefore the director is entitled to stand upon the very letter of the bond. The consent of all the stockholders to the misappropriation will not bar the proceeding by a creditor, and the creditor's right to bring suit does not depend upon any other creditor, but the court may order all to be brought in, and it is not necessary that the creditor first reduce his claim to judgment against the corporation, for it is not a creditor's bill. This provision of the constitution is self-executing, and is not in conflict with the fourteenth amendment to the constitution of the United States.[7]

[5] Winchester v. Mabury, 122 Cal. 522, 55 Pac. 393.

[6] Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77. It is contractual, not penal, Major v. Walker, 23 Cal. App. 465, 138 Pac. 360, and sundry decisions of the federal courts of this district, cited, and survives the death of the director.

[7] Winchester v. Howard, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77, and they are liable only for the moneys proved to be actually misappropriated belonging to the corporation, Western Pacific R. Co. v. Godfrey, 166 Cal. 346, 350, Ann. Cas. 1915B, 825, 136 Pac. 284. This case turned on whether stock sold was treasury stock, Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 91 Pac. 341.

It is also said in this case that directors of corporations have always been held liable for misappropriations by officers. This needs the qualification where they knew of, consented to, or connived at the misappropriations. Also it is said that the constitution limits this liability to *moneys* misappropriated. A creditor bringing such a suit occupies a position of trustee for the benefit of all the creditors, and everything which he obtains by the suit, whether by judgment or compromise, is the joint property of all the creditors, and, after deducting a just sum for his services and expenses, must be divided *pro rata* among them.[8] But it was held in the same case—the plaintiff suing in behalf of all other creditors who would join him, the complaint not showing on its face that there were other creditors, and the other creditors not joining in the action—that the suing creditor never became a trustee for the others who did not aid or assist him, and such non-joining creditors were not entitled to share in the money received in the compromise of the suit. The ordinary rule governing the distribution of funds secured by a creditor's bill has no application to proceedings under this law.

A manager of a corporation (the president is often the manager) is liable for the defalcation of a bookkeeper (who is not an officer and hence not included in the liability of the constitution) where the by-laws of the corporation gave him charge of the company's property and control over all persons in its employ with power to discharge them at will, and required that he should cause regular and accurate accounts to be kept by a competent bookkeeper.[9]

[8] Niccolls v. Rice, 147 Cal. 633, 640, 82 Pac. 321.

[9] San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

LIABILITY FOR FALSE REPORTS, PROSPECTUSES, ETC.

Section 316 of the Civil Code is as follows:

> § 316. Any officer of a corporation who wilfully gives a certificate, or wilfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby; and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable.

A valuation placed upon oil wells in a financial report issued by the officers of a corporation is a matter of opinion, and not a representation of fact, and its falsity can not be made the basis of an action under this section.[10]

But in the case of national banks, whose assets can be more accurately appraised, any material over-valuation in the financial report of its condition is a fraud on the purchasers of its stock, and the officers making the false report are liable in damages for the deceit, and this was so held, also, where the transaction was between individuals dealing with the stock in which transaction the corporation was in no way interested.[11]

Section 564 of the Penal Code is as follows:

> § 564. Every director, officer, or agent of any corporation or joint-stock association who knowingly concurs in making, publishing, or posting, either generally or privately, to the stockholders or other persons, any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or any untrue or wilfully or

10 Craig v. Wade, 159 Cal. 172, 112 Pac. 891.

11 McDonald v. De Fremery, 168 Cal. 189, 142 Pac. 78.

fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in such corporation a greater value or a less apparent or market value than they really possess, or refuses to make any book or post any notice required by law, in the manner required by law, is guilty of a felony.

A financial statement of the corporation, issued by an officer, which states the value of stocks and bonds owned by the corporation, is a statement of fact, and not of opinion, and the officer is liable under this section for its falsity.[12] See, also, the provisions of section 302 of the Civil Code.

The act of 1905, p. 786, is as follows:

§ 1. Any superintendent, director, secretary, manager, agent, or other officer, of any corporation formed or existing under the laws of this state, or transacting business in the same, and any person pretending or holding himself out as such superintendent, director, secretary, manager, agent, or other officer, who shall wilfully subscribe, sign, indorse, verify, or otherwise assent to the publication, either generally or privately, to the stockholders or other persons dealing with such corporation, or its stock, any untrue or wilfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater value or less apparent or market value than they really possess, or with the intention of defrauding any particular person or persons, or the public, or persons generally, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by

12 People v. Youtz, 26 Cal. App. 440, 147 Pac. 222.

imprisonment in state prison or a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both. (Stats. 1905, p. 786.)

This act is not unconstitutional, either on the ground that its title is insufficient or that it makes certain acts which may result in deceiving stockholders a crime.[18]

It was held in this case that a prospectus, containing the statement that the company's oil lands contained "more certain indications of oil than any other field in California," being false, and containing the further statement that the company owned 6,080 acres, upon only two quarter sections of which they had done any development work, while the fact was that the lands still belonged to the United States, justified a conviction under this statute.

The act of 1909, p. 1078, is as follows:

§ 1. Any firm, person, corporation or association of persons, or any employee of such or any of such, who in the newspapers or other periodicals of this state, or in public advertisements, or in communications intended for a large number of persons knowingly makes or disseminates any statements or assertions of facts with respect to his, its or their business affairs concerning the quantity, the quality, the value, the price, the method of production or manufacture, or the fixing of the price of his, its, or their merchandise or professional work; or the manner or source of purchase of such merchandise, or the possession of awards, prizes or distinctions; or the motive or purpose of a sale, intended to have the appearance of an advantageous offer, which is or are untrue or calculated to mislead, shall be guilty of a misdemeanor.

A party bought stock owned by the president of the corporation, on the statement by the president that the

18 People v. Merritt, 18 Cal. App. 58, 122 Pac. 839, 844.

corporation had paid a dividend for the preceding six months. The fact was that this dividend was not earned, but, relying upon the inventory and balance sheet prepared by trusted employees, the president and other directors believed it had been earned; it was held that the president was not liable to the purchaser, and was guilty of no fraud, as defined in section 1572 of the Civil Code.[14]

It was also held, where the president misrepresented the profits of the corporation as an inducement to its attorney, who was thoroughly familiar with its affairs, to make a contract for services as its attorney, that the president was not personally liable to the attorney on account of such misrepresentations.[15]

Assertions of what can be only matters of opinion, like estimates of prospective earnings, even if they prove to be untrue, can not constitute fraud.[16]

But where there was a mutual mistake, based on an erroneous calculation of a mining expert, as to the amount of ore uncovered in the mine, the estimate being ten times the actual quantity, the contract for the purchase of the property may be rescinded;[17] also, where the representations were as to the capacity of a machine to extract gold and what it had done in that respect were false, they were more than an opinion as to the value of the invention.[18]

14 Nash v. Rosesteel, 7 Cal. App. 504, 94 Pac. 850.

15 Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918.

16 Henry v. Continental Building etc. Ass'n, 156 Cal. 667, 675, 105 Pac. 960, and numerous cases cited. Lee v. McClelland, 120 Cal. 147, 52 Pac. 300.

17 Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42.

18 Sheer v. Hoyt, 13 Cal. App. 662, 110 Pac. 477.

MISCONDUCT OF DIRECTORS

Section 560 of the Penal Code is as follows:

§ 560. Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended, either—

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him, or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds, or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such other corporation;

—is guilty of a misdemeanor. (Enacted February 14, 1872.)

Clauses 1 and 2 are considered elsewhere under the appropriate headings.

In construing the third clause, it has been held that a promissory note given in payment of a subscription to the capital stock of a banking corporation is not void; that accepting the note "neither violated public policy, good morals, nor positive law" (which certainly is going far on the last point); the liability of the direc-

tors to a criminal prosecution was not involved in the case.[19]

The meaning of clause 4 is obscure.

The last clause (5) of this section is unusual, indeed extraordinary in corporation law, either civil or criminal.

While the object of this provision does not appear (for nowhere in the statutes is it made unlawful for one corporation to invest its funds in the securities of another corporation), probably this section was intended to prevent one corporation from owning another, or one being merged into another. It seems a little remarkable, in view of the fact that this section has been in our statutes for nearly forty years, that no case involving any of its clauses, except the third, has reached the appellate courts, and that there has been no judicial construction of its meaning, or application of it made to any particular state of facts.

It is perfectly legal and proper for a corporation to issue its shares and securities to a stockholder of another corporation in the purchase of the stock of the other corporation owned by the stockholder; in that way one corporation becomes the owner of another corporation; this is done in cases almost without number in all of the states of the Union, and also in this state. This prohibition runs only against the directors exchanging shares or securities of their own corporation for the shares of another corporation, directly with the other corporation. Some question might also be raised whether this section (passed in 1872) is not in effect repealed by the later constitutional provision (1879) in article 12, section 11, which is really a permission to issue stock and bonds for money paid, labor done, or

[19] Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, 13 Pac. 148. But see Jefferson v. Hewitt, 103 Cal. 624, 630, 37 Pac. 638.

property actually received, and article 22, section 1, declaring that all laws inconsistent therewith shall cease upon the adoption thereof; also section 361a of the Civil Code, which was first adopted in 1903, provides that a corporation may sell all of its property as a whole with its business and franchise, and no limitation is prescribed as to what may be received in payment therefor. Section 309 of the Civil Code expressly prohibits the directors from creating any debts beyond the subscribed capital stock, and it was seen that if they did so the debt was not void, but, under certain circumstances, the directors were personally liable for its payment. Where a statute declares the consequences of its violation, but does not say that the contract is void, the action of the statute is generally confined to the consequences named, and the contract is held to be valid. Sometimes, however, when the statute raises the forbidden act into a crime, the contract arising out of it is held to be void; but this often depends upon whether the act is *malum in se* or *malum prohibitum*. Certainly the act mentioned in this section is not immoral; nothing more than *malum prohibitum*. A solution of this question involves a consideration of a great multitude of cases in other tribunals, for in our courts it will be one of "first impression," and therefore nothing final can now be foreseen.

SUNDRY OTHER CRIMES BY OFFICERS

Sections 561, 562, and 563 of the Penal Code are as follows:

> **§ 561.** Every officer, agent, teller, or clerk of any savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note, or funds of such bank, is guilty of a misdemeanor. (Enacted February 14, 1872.)

§ 562. Every officer, agent, teller, or clerk of any bank, and every individual banker, or agent, teller, or clerk of any individual banker, who receives any deposits, knowing that such bank, or association, or banker, is insolvent, is guilty of a misdemeanor. (Enacted February 14, 1872.)

§ 563. Every director, officer, or agent of any corporation or joint stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent, or member of any corporation or joint stock association who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to such corporation or association, or makes, or concurs in making, any false entries, or omits, or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than ten years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred dollars, or by both such fine and imprisonment. (Enacted February 14, 1872. See, also, Penal Code, section 558.)

An indictment under section 563 above for making false entries in the books of a corporation must set out the particular entry, or state the substance of it according to its legal effect.[20] But it is not necessary to set out how the entries could have resulted in defrauding the corporation; that is a matter of evidence under the allegation of intent.[21]

20 People v. Palmer, 53 Cal. 615.

21 People v. Leonard, 103 Cal. 200, 37 Pac. 222.

It is not necessary that the false entries should be in a book or record of accounts; it is said this section is broad enough to cover any record or document which by law is ordered to be kept by a corporation for profit, and especially records containing business transactions in the nature of debt and credit, and that in a sense a minute book might contain memoranda of financial transactions.[22]

Sections 566 to 572 of the Penal Code are as follows:

§ 566. Every officer, agent, or stockholder of any railroad company, who knowingly assents to, or has any agency in contracting any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions, and exclusive of its real estate, is guilty of a misdemeanor. (Enacted February 14, 1872. See, also, Civil Code, sections 309, 456, 457.)

§ 567. The last section does not affect the validity of a debt created in violation of its provisions, as against the company. (Enacted February 14, 1872.)

§ 568. Every director of a corporation or joint stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of this chapter. (Enacted February 14, 1872.)

§ 569. Every director of a corporation or joint stock association, who is present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter, occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered

[22] Ex Parte McKenney, 10 Cal. App. 357, 101 Pac. 927.

in the minutes of the directors. (Enacted February 14, 1872. See, also, Civil Code, sections 309, 377.)

§ 570. Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this chapter, occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors. (Enacted February 14, 1872.)

§ 571. It is no defense to a prosecution, for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, government, or country, if it was one carrying on business or keeping an office therefor within this state. (Enacted February 14, 1872.)

§ 572. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law. (Enacted February 14, 1872.)

PENAL CODE

EMBEZZLEMENT

Sections 504 and 506 of the Penal Code are as follows:

§ 504. Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of

his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. (Amended April 6, 1880; amendts. 1880, p. 8.)

§ 506. Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than that for which he received it, is guilty of embezzlement. (Amended March 22, 1907; stats. 1907, p. 892.)

The state of facts necessary to constitute the crime of embezzlement has been so enlarged in this state, from time to time, that this offense bears little resemblance to the crime as formerly defined.

It is not necessary, under this section, that the funds be appropriated directly or even indirectly to the use of the person so taking or misappropriating the same. And while intent is still retained as an essential element of the crime, the voluntary act of so appropriating or using the funds is sufficient proof of the fraudulent intent, and the fact that, at the time of the taking, the accused intended to restore the property, is no defense, unless it be restored before an information has been filed with a magistrate or before indictment, if the charge is by a grand jury.[23] The restoration of the property before information filed, or indictment found, is no defense, but may be considered only in mitigation of punishment.[24]

[23] Penal Code, section 512, and People v. McLean, 135 Cal. 306, 67 Pac. 770.

[24] Penal Code, sections 512 and 513, and People v. Royce, 106 Cal. 173-189, 37 Pac. 630, 39 Pac. 524; People v. DeLay, 80 Cal. 52, 22 Pac. 90.

It is embezzlement if the funds are lent upon poor or insufficient security to another corporation in which the accused is interested.[25] And if the officers receive deposits of money from the customers of the corporation, for safe keeping, with the knowledge of the directors, and embezzle the same, the directors are liable.[26]

It is sufficient if the corporation whose property is misappropriated be only a *de facto* corporation, and no demand for the return of the property is necessary in order to make the offense complete, and it is not necessary for the accused to be a *de jure* officer; if he is a *de facto* officer it is sufficient.[27] Nor does it matter that the funds were withdrawn from a bank by the accused on the order of the corporation for the purpose of hindering and delaying its creditors.[28]

Taking the funds of the corporation and depositing in their place securities known by the accused to be worthless is embezzlement.[27]

But the depositing of money received for the corporation in the personal account of the officer, not clandestinely but reported to the bookkeeper of the company, in the meantime there being no need for the money and no demand having been made for it, does not constitute embezzlement.[29]

It was intimated in a case that if the money was claimed by the officer under a *bona fide* claim the retention of the money would not necessarily be embezzle-

25 Winchester v. Howard, 136 Cal. 432-443, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

26 Vujacich v. Southern Commercial Co., 21 Cal. App. 439, 443, 132 Pac. 80.

27 People v. Leonard, 106 Cal. 302, 39 Pac. 617.

28 People v. Ward, 134 Cal. 301, 66 Pac. 372.

29 People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

ment;[80] the condition implied in the words "not necessarily" would probably be that the claim was valid.

It is not necessary that the treasurer of an association be a member of the association to sustain a charge against him of embezzlement of the funds of the association, nor to state who were the members of the association, its name being alleged.[81]

No attempt is made here to note more than a small fraction of the cases on embezzlement, the cases here cited being mostly cases of officers or agents of private corporations. As the foundation of this crime in any case is the existence of a fiduciary relation, all cases of embezzlement are of more or less importance in marking out the lines bounding the crime, but to go into that field extensively is not within the scope of this work. Enough is noted to show that officers, etc., of corporations are on the same plane with public officers, trustees, and all other persons occupying a position of trust and confidence, and that the law is very strict, and very broad, and the defenses few, indeed.

FRAUDS IN SUBSCRIPTIONS, OR IN ORGANIZATION, OR IN INCREASING CAPITAL STOCK

Sections 557, 558 and 559 of the Penal Code are as follows:

> § 557. Every person who signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any under-

[80] People v. Westlake, 124 Cal. 452-455, 57 Pac. 465.

[81] People v. Mahlman, 82 Cal. 585, 23 Pac. 145.

standing or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor. (Enacted February 14, 1872. Subscription to Articles of Incorporation: Civil Code, section 292. Subscription to capital stock, in certain cases: Civil Code, section 293. Oath to subscription, in certain cases: Civil Code, section 295.)

§ 558. Every officer, agent, or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison for not less than three nor more than ten years. (Enacted February 14, 1872. False certificates, report, or notice—civil liability of officers: Civil Code, section 316. Organization of corporations: Civil Code, section 283, et seq. Records: Civil Code, sections 377, 378. Increasing capital stock: Civil Code, section 359. See, also, Penal Code, sections 559, 564.)

§ 559. Every person who, without being authorized so to do, subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member, or promoter of such corporation or association, is guilty of a misdemeanor. (Enacted February 14, 1872. Persons engaged in banking must show true name: Civil Code, section 582. See, also, Penal Code, section 558.)

CHAPTER XVIII

DIVIDENDS — UNEARNED DIVIDENDS — DEBT LIMIT — STOCK NOT TO BE DIVIDED—INCREASE OR DECREASE OF CAPITAL —DIRECTORS' LIABILITY—EXCEPTING WATER CO. STOCKS

Section 309 of the Civil Code is as follows:

§ 309. The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof;

Nor must they create any debts beyond their subscribed capital stock;

Nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided,

Nor reduce or increase the capital stock, except as herein specially provided.

For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted;

And no statute of limitation is a bar to any suit against such directors for any sums for which they are liable by this section;

Provided, however, that where a corporation has been heretofore or may hereafter be formed for the purpose, among other things, of acquiring, holding, and selling real estate, water, and water rights, the directors of such corporation may, with the consent of stockholders

representing two thirds of the capital stock thereof, given at a meeting called for that purpose, divide among the stockholders the land, water, or water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them. All conveyances made by the corporation in pursuance of this section must be made and received subject to the debts of such corporation existing at the date of the conveyance thereof.

Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence. (Amended March 21, 1905; stats. 1905, p. 558.)

For the *criminal* liability of directors, see "Liability of Directors," and Penal Code, section 560, and other sections, ante.

DIVIDENDS

The payment of cash dividends is largely one of policy, intrusted to the discretion of the directors which, when honestly and intelligently exercised, will not be lightly overruled.[1] A dividend from the production of a mine is not improper, although the funds for the same are produced by the exhaustion of the property.[1]

The supreme court had occasion in the matter of the dividends of a bank[2] to define the expression "surplus profits arising from the business." It said the word "profits" signifies an excess of the value of returns over the value of advances; "the receipts of a business, deducting current expenses, it is the equivalent of net receipts"; "it is well understood to imply the net return of the capital or stock employed after

1 Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Excelsior Water etc. Co. v. Pierce, 90 Cal. 131-146, 27 Pac. 44.

2 People v. San Francisco Savings Union, 72 Cal. 199, 13 Pac. 498.

deducting all the expenses, including not only the wages of those employed by the capitalist, but wages of the capitalist himself for superintending the employment of his capital stock"; "profits are divided by writers on political economy into gross and net, the former being the entire difference between the value of advances and the value of returns, and the latter so much of this difference as arises exclusively from the capital employed"; "strictly speaking, income means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures, while profits generally mean the gain which is made upon any business or investment, when both receipts and payments are taken into account"; "net earnings are properly the gross receipts less the expense of operating; . . . interest on the debts is paid out of what remains, that is out of net earnings. Many other liabilities are paid; . . . the remainder is in the profit to the shareholders."

The court, then, making the application of these conceptions to dividends out of surplus profits, says: "Under these definitions, it is not easy to comprehend how profits or surplus profits can consist of earnings not yet received [interest due but not yet paid]. The term imports an excess of receipts over expenditures, and without receipts there can not properly be said to be profits," and holds that the bank could not declare dividends based on interest earned but not yet paid, no matter how well secured it might be.

The defect of these, and indeed of almost all such definitions, is that they define expressions to a considerable extent in their own terms. But none of them in terms covers provisions for losses, or maintenance of plant—that is, none of them provide for preserving the integrity of the capital originally contributed. Such matters can be provided for only out of profits, and

net or surplus profits can not arise until after they are paid. Most other matters are comparatively simple in ascertainment, but these two are often difficult to determine, and most disputes as to what are net profits arise on account of these two matters.

In English "net profits" and "surplus profits" are not quite synonymous, but in this statute it is fair to presume by "surplus profits" that "net profits" is meant; but what remains after what is needed, necessary, or wanted, is uncertain on account of the divergent views of minds on those questions.

The "capital stock" referred to in section 309 of the Civil Code is not the share or nominal capital but the actual property of the corporation contributed by the shareholders.[8] It is said that "capital stock" as used in this section is better expressed by the word "capital" and means the money or property with which the corporation carries on its business. But this construction is absurd when applied to the prohibition on increasing the "capital stock," and it will be observed that this phrase is the only one used in this section characterizing either "capital" or "stock." This construction, however, has become too firmly established to be now shaken. Clearly this was not the intention of the legislature, nor is it the English of the expression. If "capital stock" had no clear and definite meaning, or if in the connection where it is used its ordinary meaning could not be applied, or the provision in its ordinary meaning served no purpose, search for another signification might be justified. As used here, according to the structure of the English language, it means what

[8] Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Kohl v. Lilienthal, 81 Cal. 378, 385, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689; Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 140, 27 Pac. 44; continuing in a line of decisions cited in, and ending with, Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582.

it says—"capital stock," or shares—and this section prevents such a distribution, that is, dividing the stock or shares, or increasing or reducing the "capital stock," except as elsewhere provided. The manner of decreasing the capital stock is provided in section 359 of the Civil Code; it is not divided, but extinguished.

Growing out of the definition given to these words has sprung the doctrine that, on the consolidation of two corporations into a third, the stock of the new one can not be given in exchange to the stockholders of the old corporations, contrary to the great weight of authority. The same thing is accomplished by the new corporation buying the stock from the stockholders (not from the corporation, see Civil Code, section 560, *supra),* instead of the property, of the old corporations, and giving its own in exchange. True, a dissenting stockholder may hold out, necessitating the trouble and expense of maintaining the organization and separate existence of the old corporations. Under the construction above the new company would receive and hold in its treasury the stock received, making the new corporation a "holding company," with all the usual evils as to voting and control of holding companies.

The corporation was effectually prevented from dividing its property by the provision that the directors shall not make any dividends except from the surplus profits arising from the business. The construction given to the expression "capital stock" makes it useless, while we believe the proper meaning prevents stock dividends as well as decreasing the capital stock in this manner; the only consequence of a stock dividend now is that in case of insolvency of the corporation the holder of it may be required to pay it up in full in cash.

Kohl v. Lilienthal, *supra,* on a similar state of facts reached a similar conclusion, two of the judges dissent-

ing and adopting the unanimous opinion of the three commissioners who heard and decided the case in the first instance. The principle upon which this dissenting opinion was founded was the foundation of the recent decision in Baldwin v. Miller & Lux, 152 Cal. 454, 92 Pac. 1030, although no mention is made of it in the latter case.

There is nothing in our law which requires net profits to be divided. The majority may use net profits for all time to augment capital, thus really forcing a loan from the minority stockholders; and this power has often been used for manipulation purposes in controlling the price of the shares—a destroying force sweeping over the unable. As a consequence, bonds have become popular, often representing substantially all the capital invested in the enterprise; while the stock represents only the possibility of earning more than a reasonable return upon the capital invested. The laws of some of the states, like New Jersey and others, recently have made it lawful for the corporation to provide in its Articles of Incorporation that bonds may vote equally with a like amount of stock, and almost everywhere preferred stock may now be created, thus securing some sure return to inactive capital and also a voice in the management.

To be entitled to the dividends, one must be the owner of the stock at the time the dividends are declared.[4] An executory contract to purchase the stock does not entitle the prospective purchaser to the dividends.[5]

[4] Brewster v. Lathrop, 15 Cal. 21; Dow v. Gould & Curry etc. Min. Co., 31 Cal. 629, 630; Ashton v. Zeila Min. Co., 134 Cal. 408, 66 Pac. 494. On stock dividends see Harris v. San Francisco Sugar etc. Co., 41 Cal. 393.

[5] Gilfallan v. Gilfallan, 168 Cal. 23, Ann. Cas. 1915D, 784, 141 Pac. 623.

The pledgee is entitled to all dividends declared upon the stock,[6] but if he fails to collect them he is not compelled to credit them upon the debt; but in such a case and where the stock has been transferred on the books of the corporation to the pledgee the pledgor must account for all dividends received by him to the pledgee.

DECLARING UNEARNED DIVIDENDS

If the directors declare and pay any dividends except from surplus profits arising from the business, or divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock (except on the dissolution of the company), or create any debts beyond the subscribed capital stock, all who have not caused their dissent to be entered on the minutes, or were not present when it was done, are jointly and severally liable to the corporation and its creditors for the capital stock so divided, withdrawn, paid out, or reduced, and no statute of limitations is a bar to such liability. An exception is made in the case of real estate and water companies. Civil Code, section 309, *supra*.

A similar statutory prohibition which in terms declared "it shall not be lawful," instead of "must not," etc., was said to be designed to protect creditors and stockholders against mismanagement and distribution of the capital stock in the form of dividends, and included the stockholders and corporation as well as the directors.[7]

The capital or all the assets except surplus profits are to be retained intact and form a fund to which creditors of the corporation have a prior right over stockholders. Profits or interest on investment or securities, no

[6] McAulay v. Moody, 128 Cal. 202, 60 Pac. 778.

[7] Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365. The syllabus of this case is inaccurate on this point.

matter how secured, are not money in hand and may never be received,[8] and can not be made the basis of a dividend.

A corporation, not for profit, can not divide any part of its funds among its members.[9]

This section (Civil Code, section 309) is held[10] not applicable to a mining corporation, whose property is of a kind which can not be used except by consuming it. On general principles this is sustained by all authorities, but it can not be sustained upon the language of this section as interpreted in the preceding cases. This case also holds that dividends are legal, notwithstanding the corporation has a large debt arising from the purchase of the property, and that it borrowed money to pay the dividends, net profits having been temporarily used a short time before for payments on the debt above mentioned, or for constructing permanent improvements, like tunnels, etc.

Martin v. Zellerbach, and Kohl v. Lilienthal were affirmed in a case where a corporation sold all its patents and property to another corporation, the stock of the purchasing corporation being given to the stockholders of the selling corporation in payment therefor.[11] But where a corporation sold all of its property for a sum of money and a great majority of the stockholders (the plaintiff included) agreed to surrender their stock to the purchaser on receiving their respective proportions of the purchase price, which agreement as to distribution was carried out with all

8 People v. San Francisco Savings Union, 72 Cal. 199-204, 13 Pac. 498.

9 Ashton v. Dashaway Ass'n, 84 Cal. 61, 69, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091.

10 Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

11 Schaake v. Eagle etc. Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

the stockholders except the plaintiff who sued for his proportion, it was held that the whole transaction was void under this section as a dividend of its capital stock,[12] and that the complaining stockholder's remedy was not to sue for his proportion but to require all the money distributed to be returned to the corporation. This case and all those cited above, where the distribution was held to be improper, base the relief granted on the theory that the transaction being forbidden by law is void.

We now come to some cases where quite a different conclusion was reached. There is a peculiar line of decisions in this state that corporations may be formed to liquidate partnerships and divide the assets in the shape of dividends to the stockholders.[13] If these corporations assumed the form of an agency, or if they took the form of trustees to which property was conveyed to execute a trust, the form would be familiar; their capital would be something apart from the property administered and to be divided, and dividends could be lawfully made under the statutes out of the profits of their business. But in these cases capital stock is issued for the entire value of the trust property, and dividends are made from time to time out of the proceeds of the sales of the trust property until it is all gone, leaving the entire capital stock in existence, representing nothing and worthless. The court recognizes the fact that there is no statute expressly permitting such dividends and reduction of capital, but says that the purpose of the corporation is made so clear "that it must be given that effect, even if it is inconsistent in some particulars with the provisions of the law governing corporations," and quotes the Civil Code that "private corporations may be formed for any

12 Tapscott v. Mexican etc. Land Co., 153 Cal. 664, 96 Pac. 271.

13 Baldwin v. Miller & Lux, 152 Cal. 454, 92 Pac. 1030, and cases cited.

purpose for which individuals may lawfully associate themselves." The Articles of Incorporation provided "that the profits and dividends to be divided annually were to consist of the excess of the proceeds of the property over the debts and expenses" and, in order to avoid the apparently absolute prohibition of dividends of anything but surplus profits, the court said that section 309 of the Civil Code "does not make such acts of the directors void, but declares merely that certain consequences shall follow such acts, namely, that the directors shall personally be liable to the corporation and the creditors for the amount of the capital so divided." Taking all these statements together they announce very novel law. Here is the statute absolutely prohibiting the directors making a dividend of the capital or any part thereof, and sections 560 *et seq.* of the Penal Code make such an act a crime; yet the court says it is lawful, and that the only consequences are that the directors must restore the amounts so divided and go to jail for their crime. The reference to a clause in section 309 in regard to companies acquiring, etc., "real estate, water and water rights" [not *or* water rights] being empowered to divide the same among their stockholders is inapt, for such division is in kind, and this particular corporation owned a vast amount of personal property, and one of the purposes for which it was organized was to conduct that business until it could be advantageously sold, and to divide the proceeds of sales from time to time. No rights of creditors were involved. It seems a fair deduction from this decision, if all the stockholders consent, and no rights of creditors are involved (or if they consent) that, after all, dividends may be made from capital. But we still have the declaration in Martin v. Zellerbach, that "as to all creditors of the company, prior or *subsequent,* it was simply void." We think this

statement goes too far. The creditor still has the personal liability of all of the stockholders and, under this section, of the directors, and if nothing could be recovered from them by the creditor directly, nothing could be accomplished at the suit of the creditor to compel them to restore the funds or property of the corporation. And the subsequent creditor doctrine would open up matters, so many years past, that all memory or record of them has passed away. Statutes are sometimes strained to enable parties to accomplish an innocent purpose and one not forbidden by law when the object desired can be attained in no other way, but, as we have seen, no such difficulty existed in this case. How far this doctrine will travel through our law can not be foreseen.

This case is followed by another very singular one in corporation law.[14] Two persons owning all the stock of the corporation, according to the pleadings—a majority, according to the contract in question between them—agreed between themselves that all the property of the corporation should be sold, and out of the proceeds a specific sum should be paid to one of them and that the remainder should be paid to the other. There was no provision that the corporation should be dissolved, but the court held that such a proceeding must have been in the minds of the parties, for in no other manner could the capital of the corporation be legally divided, and on that presumption declared the contract legal and effective. But this contract made no provision for the payment of debts, nor was any showing made that all the demands against the corporation had been satisfied and discharged, which the law requires as a condition of application for dissolution, and the agreement as to the distribution of the capital was in violation of law which requires distribution to be to all

[14] Burne v. Lee, 156 Cal. 221, 104 Pac. 438.

shares alike. These cases, and those concerning the power and responsibility of persons owning all, or substantially all, of the stock of a corporation,[15] introduce a disintegrating solvent into the law of corporations, all the natural consequences of which can not be foreseen, and the process promises the creation of much confusion.

A by-law of any corporation (except of a strictly building and loan association), which provides that a stockholder under certain conditions may withdraw his capital stock, is void under said section 309—"What the directors can not do the stockholders can not do or authorize to be done"[16]—but a sale of corporation property may be made to a stockholder for an adequate consideration.[17]

AGREEMENT TO REPURCHASE

A remarkable decision[18] by our supreme court on this subject has recently been made. A party, not being a

15 See cases under Civil Code, section 305, "Directors' Powers."

16 Vercoutere v. Golden State Land Co., 116 Cal. 410, 415, 48 Pac. 375. See Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582.

17 Robinson v. Muir, 151 Cal. 118, 90 Pac. 521.

18 Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582.

This decision is almost wholly unsupported by authority; the few cases cited are brief, poorly reasoned, and almost none of them are directly in point. The decisions of our appellate courts are squarely against the right of a corporation to purchase its own stocks (except in collection of assessments), and the decisions of other states where a corporation may do this are not authority, for the decision in this case is not only that, but something more; it compels the corporation to buy at the will of another; to keep funds in hand to do this, perhaps for years; it permits such a stockholder to speculate at the cost of the corporation, and of his fellow stockholders, on the future success of the enterprise; in its very nature, it is a private secret agreement favoring one stockholder over another; by the effect

subscriber, purchased shares of the stock directly from the corporation, paying par therefor, but taking at the same time a written agreement from the corporation that, on ninety days' notice, the corporation would repurchase the shares from him at par, with 8 per cent interest. There was no time limit on this agreement, except that this option on the part of the purchaser should be exercised before the dividends on the shares equaled the par value of the stock. After several years, the purchaser exercised this option, demanded that the corporation repurchase the shares on the terms above and, the corporation refusing to do so, brought suit against it for the amount paid by him, offering to return the stock. The court upheld the legality of this collateral agreement, and reversed the decision of the court below sustaining a demurrer to the complaint.

In a case decided a month later, without citation or reference to the above case, the district court of appeal, in a like case but between individuals, held that such a contract to repurchase the stock within a certain time at an advance is not a "bilateral agreement of repurchase and sale"; that it was made as an inducement to persuade the plaintiff to buy the shares, and that the buyer of the stock could not be compelled to resell but had an option to compel the seller to repurchase. In other words, the buyer was the owner of the stock until

of its very terms it is a fraud upon every other stockholder not knowing and consenting thereto at the time it is made, and that knowledge and consent should be alleged and proved; it reasonably follows that private and secret agreements may be made with many or all stockholders, and these agreements may be as varied as the number of stockholders; such agreements are far more obnoxious than a uniform by-law on that subject, which by-laws our courts have declared unlawful; and last, but not least of all, it is a method often employed for corrupting public servants who fear to take direct bribes.

he actually made a resale.[19] And an agreement to repurchase, within a stated time at the option of the buyer, stocks sold by one individual to another may be enforced, although the corporation had forfeited its charter at the time of the sale, without regard to any question of fraud in the transaction.[20]

EXCESSIVE DEBT

The debt here meant is the debt existing at any one time, not the total amount of debts incurred by the corporation during its existence, and the subscribed capital includes that which is paid up, or partially paid up, or subscriptions upon which nothing has yet been paid.[21] The law is penal in its action and should be strictly construed; every intendment and presumption is in favor of the defendant,[22] and it must be shown that the director was a director when the debt was created and that he was present at the meeting which authorized it.

Under the public utilities act, debts to any amount, approved by that commission, may be issued by public utilities companies without the directors becoming liable to the penalty prescribed in Civil Code, section 309; the penalties for such companies issuing securities without the approval of that commission are very severe and are prescribed by that act.[23]

19 Scott v. Goodin, 21 Cal. App. 178, 131 Pac. 76. See also Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082.

20 Fites v. Marsh, 171 Cal. —, 153 Pac. 926. For a discussion of evidence, see Flickinger v. Wrenn Invest. Co., 171 Cal. —, — Pac. —.

21 Moore v. Lent, 81 Cal. 502, 22 Pac. 875.

22 Irvine v. McKeon, 23 Cal. 472, 474. See a lengthy discussion of this point but without decision. Moss v. Smith, 172 Cal. —, 155 Pac. 90. See note below.

23 Moss v. Smith, 172 Cal. —, 155 Pac. 90. But a writ of error has been allowed by the U. S. Supreme Court, where this case is now pending on appeal.

Great doubt has been cast by conflicting decisions upon the meaning and the phraseology of this section, and of its effect upon different transactions. The "must not" of this section has been construed in two different ways; in one line of decisions it has been held to be a prohibition on the corporation as well as on the directors; in the other line, that the prohibition runs against the directors only and not against the corporation.

In the first line, in the leading case,[24] it was said, "the inhibition runs against the directors because they are, under the law, the managers of the business of the corporation. What the directors can not do (with few exceptions, of which this is not one) the stockholders can not do, or authorize to be done."

In the second line, involving the creation of an indebtedness beyond the subscribed capital stock, it is held that "section 309 does not purport to limit the power of the corporation, but only to regulate and check the exercise of that power by the directors" and that the

[24] Kohl v. Lilienthal, 81 Cal. 378, 387, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689. This language is quoted with approval in Vercoutere v. Golden State Land Co., 116 Cal. 410, 415, 48 Pac. 375. That this prohibition runs also against the corporation, as well as directors, was first declared in Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, followed in San Francisco etc. R. Co. v. Bee, 48 Cal. 398, 404-5; Schaake v. Eagle etc. Can Co., 135 Cal. 472, 484, 63 Pac. 1025, 67 Pac. 759; Tapscott v. Mexican etc. Land Co., 153 Cal. 664, 667, 96 Pac. 271; Burne v. Lee, 156 Cal. 221, 228, 104 Pac. 438, and Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582. These were cases involving dividends of capital stock, and they were held to be illegal, and the acts of both the directors and corporation null and void. There is, however, one decision involving dividends of capital directly to the contrary, where it is said "but this section does not restrain 'the corporation' from paying dividends out of capital stock," see Baldwin v. Miller & Lux, 152 Cal. 454, 463, 92 Pac. 1030.

creation of the excess debt (notes and mortgages) was not prohibited by that section.[25]

In a case[26] which was exhaustively argued and thoroughly considered, it was decided that this section 309 does not declare debts in excess of the subscribed capital stock void, nor does it deprive the *corporation* itself of the *power* to create such debts, but merely creates a remedy in favor of the corporation and its creditors against the directors for the improvident or fraudulent exercise of this power and the creation of debts in excess of the subscribed capital and beyond the ability

25 Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049; to same effect as to bonds secured by deed of trust, Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 899, 921, 51 Pac. 710, in a case involving dividends out of capital stock, after quoting this section, 309, quite fully, the court says, "it is to be observed that this section is aimed at the directors alone . . . and does not make such acts of the directors void," Baldwin v. Miller & Lux, 152 Cal. 454, 463, 92 Pac. 1030; Hawke v. California Realty etc. Co., 28 Cal. App. —, 152 Pac. 959, 963.

An interesting discussion of the legality of such excess bonded debt is contained in the opinions of the attorney general and of the commissioner of corporations in June and July, 1915, in the Matter of the Application of Huntington Land & Improvement Co. for leave to issue bonds in excess of its capital stock, the former holding that a domestic corporation could not make such an issue, while the latter held that it could. The attorney general said, however, that a foreign corporation was not affected by the prohibition contained in Civil Code, section 309.

26 Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049. See Smith v. Ferries etc. R. Co., 5 Cal. Unrep. 889, 51 Pac. 710, by an equally divided court. But the prohibitions contained in this section are held to run against the corporation and the stockholders as well, Tapscott v. Mexican etc. Land Co., 153 Cal. 664, 667, 96 Pac. 271; Burne v. Lee, 156 Cal. 221, 228, 104 Pac. 438; Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582, a principle directly opposed to Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049. But see, contra, Baldwin v. Miller & Lux, 152 Cal. 454, 462, 92 Pac. 1030. See Hawke v. California Realty etc. Co., 28 Cal. App. —, 152 Pac. 959, 963; and for a discussion of persons to whom the benefit of this liability should ultimately go, see Moss v. Smith, 171 Cal. —, — Pac. —.

of the corporation to pay. The court says further that if such a debt is void it would be absurd and unjust to make the directors liable to the corporation itself (as this section appears to do), especially if the corporation had received a consideration equal in value to the debts created; but that "as indemnity to the corporation, in case it should be compelled to pay such debts, or to its creditors in case of the insolvency of the corporation, such liability of the directors is reasonable and just," and that on any other construction the corporation could receive and retain the consideration and repudiate the debt. But if the corporation had received full value for the debt, how the latter consequence (indemnity liability) could be reasonable and just does not clearly appear.

The court adds that this section does not purport to limit the power of the corporation, but only to regulate and check the exercise of that power by the directors, as might have been done by a by-law, though probably a by-law could not go to the extent of making the directors liable for the excess of debts. It would seem that this difference between the power of the corporation and the power of the board of directors (as a corporation can create no debt except through its board of directors) is a distinction without a difference. The real condition existing is that the power, being in the corporation, as a consequence exists in the directors.

If no consequence of this act had been declared by the state, under the well established rule where an act is expressly forbidden, the act would be void; but, as the court says, the consequences having been expressly declared by the statute, under another familiar rule where a statute expressly states the consequences, no others follow.

This was a decision of the court in bank, two of the seven judges dissenting without filing opinions, and

was rendered in 1892. No case on this point has since gone to the appellate courts, except the Smith v. Ferries etc. R. Co. case, decided by an equally divided court, and this decision, remaining neither modified nor reversed for nearly twenty years, may be regarded as settled law.

This decision also declares that notes executed to a payee, without the words "or order" (that is, non-negotiable in form), though secured by mortgage, are not a "bonded indebtedness" within the meaning of article 12, section 11, of the constitution requiring the consent of the majority of the stock, and that if a by-law of the corporation prohibits the creation of such excess debt the stockholders may waive the prohibition of the by-laws, either by resolution passed by a vote equal to that required to adopt the by-laws, or by their conduct or acquiescence, and that slight evidence of acquiescence is all that is required; and that want of knowledge on the part of some of the stockholders who voted for the ratification does not affect it, for "shareholders can not avoid responsibility for the unauthorized acts of their agent by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success."[27]

It is permissible to file a certificate for the *original creation,* as distinguished from an increase, of a bonded debt in excess of the stock subscribed at that time, but the bonds can not be issued (which is the time of the creation of the debt) except as the stock is subscribed; the bonds may be issued from time[28] to time as rapidly as the stock is subscribed.

27 This quotation was approved in San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 62, 64, 33 L. R. A. 788, 44 Pac. 333; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 489, 45 Pac. 809, and this rule is declared in Morawetz on Private Corporations, section 629.

28 Merced River Electric Co. v. Curry, 157 Cal. 727, 109 Pac. 264.

REDUCTION OF CAPITAL STOCK

The conversion of stock by a corporation refusing to make a transfer of the same on its books is not a reduction of its capital stock, for the stock may be reissued,[29] but this reason hardly meets the case; it is true its authorized capital is not reduced, but its actual capital is, by the amount of damages recovered for the conversion. It was the latter evil this section was intended to prevent—that is, the improper withdrawal of the funds of the corporation. It was held that a purchase by a corporation of its stock is such a reduction.[30]

CAPITAL STOCK NOT TO BE DIVIDED

We already have seen in the preceding paragraphs what is the interpretation given to the term "capital stock" by our courts. The prohibition on stock dividends has been upheld by our courts to the fullest extent.[31]

DIRECTOR'S LIABILITY

For the liability of directors for making unlawful distribution of dividends, and for doing other acts prohibited by this section, see chapters on Director's Liabilities.

[29] Ralston v. Bank of California, 112 Cal. 208-214, 44 Pac. 476.

[30] Tulare Irr. Dist. v. Kaweah etc. Co., 5 Cal. Unrep. 330, 44 Pac. 662; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444; Schulte v. Boulevard Gardens etc. Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582.

[31] Martin v. Zellerbach, 38 Cal. 300, 309, 99 Am. Dec. 365; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444; Ralston v. Bank of California, 112 Cal. 208, 213, 44 Pac. 476; Vercoutere v. Golden State Land Co., 116 Cal. 410, 48 Pac. 375, and cases cited in those decisions. Acknowledged in Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 468, Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582.

CHAPTER XIX

ASSESSMENTS—DIRECTORS MAY LEVY

Section 331 of the Civil Code is as follows:

> **§ 331.** The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form, and to the extent provided herein. (Amended March 30, 1874; amendts. 1873-4, p. 206.)

This section, as originally adopted in 1872, did not contain the condition that one-fourth of the capital must first be subscribed; this condition was added by the amendment of 1874, since which the section has remained unchanged.

The first case[1] arising under this section contains an interesting and instructive discussion of the preceding statutes which, to a considerable extent, were the basis of this section. In this case it was held that a corporation may levy and collect assessments upon full paid shares. The questions of the extent and limitations of assessments will be considered under the two following sections.

Ordinarily a requirement of payment upon a subscription, or to pay up stock to par, is designated by

1 Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100; Sayre v. Citizens' Gas Light & Heat Co., 69 Cal. 207, 208, 7 Pac. 437, 10 Pac. 408.

the term "call,"[2] but in this state every requirement of payment upon, or on account of ownership of, shares, except a creditor's suit against an individual stockholder to enforce the constitutional and statutory liability, is called an assessment, and the proceedings therefor must be taken under this and the following sections.

These proceedings can be instituted and carried on only by the directors, usually so long only as the corporation has not been declared insolvent. But it has been held that even when the corporation has been adjudged insolvent, still the directors may assess shareholders upon *unpaid subscriptions* for the purpose of paying its debts and finally settling its affairs; that, although no shares can then be sold under the assessment for, the corporation being out of existence, "there was nothing to sell," still the directors may collect the assessment by action against the shareholders.[3] In such a case, if the corporation be insolvent, courts of equity may order, that is, really make assessments to pay the corporate debts.[4] Bankruptcy courts have similar powers, but they can not sell the claim against the stockholder until the assets of the corporation are exhausted and the amount of the liability has been ascertained, and such an assignee acquires no rights against the stockholder.[5]

2 This difference is recognized in Union Savings Bank v. Leiter, 145 Cal. 696, 703, 79 Pac. 441.

3 Union Savings Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084, and see cases cited. Union Savings Bank v. Leiter, 145 Cal. 696, 700, 79 Pac. 441; Union Savings Bank v. Rinaldo, 6 Cal. App. 637, 92 Pac. 873; Burke v. Maze, 10 Cal. App. 206, 210, 101 Pac. 438, 440.

4 Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Welch v. Sargent, 127 Cal. 72, 83, 59 Pac. 319; Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711.

5 Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

A *de facto* board of directors has power to levy an assessment.[6] But if made by an illegally elected board, for fraudulent purposes, the sale is void.

So, also, the levy of an assessment by a *de facto* reclamation district is valid and may not be enjoined, and if *quo warranto* proceedings to exclude such a body from acting as a corporation be sustained, that judgment would not affect the validity of acts performed before the judgment in *quo warranto*.[7]

As an instance of technicality of pleading required, a complaint to set aside an assessment, which alleged that it was made at a meeting of three directors only, was fatally defective in failing to allege that the corporation was one for profit only and could not diminish the number of its directors without amendment of its Articles.[8]

CAN STOCK BE MADE NON-ASSESSABLE?

Whether, under the laws of this state, a corporation had power to issue stock upon which no assessment could be levied was long a question of doubt, and notwithstanding some recent decisions, is still a matter of uncertainty in some kinds of cases where creditor's rights are involved.

[6] San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; same v. Belding, and same v. Hewlett, and same v. Hitchcock, 35 Pac. 353. But see Whitehead v. Sweet, 126 Cal. 67-74, 58 Pac. 376, and decisions under Civil Code, section 344, post, O'Dea v. Hollywood etc. Co., 154 Cal. 53-69, 97 Pac. 1; see Robinson v. Blood, 151 Cal. 504, 91 Pac. 258.

[7] McPhee v. Reclamation Dist., 161 Cal. 566, 571, 572, 119 Pac. 1077; Reclamation Dist. v. McPhee, 13 Cal. App. 382, 109 Pac. 1106, overruling Reclamation Dist. v. Burger, 122 Cal. 442, 55 Pac. 156, on that point.

[8] Humphry v. Buena Vista Water Co., 2 Cal. App. 540, 542, 84 Pac. 296.

In a very early case it was said that the individual liability of a stockholder was not a matter of public concern any more than the liability of partners, and has no foundation in public policy; that it was a liability created by law, as it might be by contract, and is intended only for the benefit of creditors, and it was held that "the party interested in that right may contract to waive it." It will be observed, however, that this was not a suit by a creditor of the corporation, or even by a stockholder, but was a suit by a taxpayer to enjoin a subscription by a city to the stock of a railroad, and the claim was that the clause of the proposed contract of subscription exempting the city from liability for the debts of the railroad was ineffectual in law, and to enjoin the city from making the subscription. The court refused the injunction.[9] In a later case there are *dicta* to the effect that a creditor may waive this provision for his benefit, but that a by-law in his savings bank book of deposits exempting the stockholders of the bank is not sufficient.[10] The legislature has no power to pass a law making such exemption.[11] Two other cases touch the case remotely and in an inconclusive way.[12]

A *corporation* may waive its rights to levy assessments on its stockholders where no rights of creditors are *directly* involved. In the first case to this effect the question presented was: "Where a California corporation sells shares of its capital stock upon the express agreement that the said stock shall be issued

9 French v. Teschemaker, 24 Cal. 518-559.

10 Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090.

11 McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

12 Sayre v. Citizens' Gas etc. Co., 69 Cal. 207, 208-213, 7 Pac. 437, 10 Pac. 408; Campbell v. Santa Maria Oil etc. Co., 153 Cal. 282, 95 Pac. 39.

as fully paid and shall be non-assessable, and the certificates of stock recite that the stock is fully paid and non-assessable, may the corporation levy an assessment upon such stock where no rights of creditors are directly involved?" The supreme court held that the corporation could not.[18]

This was a suit by a stockholder to enjoin the corporation ("not adjudged insolvent, and actually engaged in the transaction of its ordinary business") from selling his stock for non-payment of an assessment; but it was shown, and not disputed, that the corporation "was heavily in debt and practically insolvent, and that the assessment in question was levied primarily for the purpose of paying the claims of creditors of the corporation." The case was distinguished from Union Savings Bank v. Leiter, *supra*, by saying that the corporation in the latter case had been adjudged insolvent, and was being liquidated by the directors under the direction of the bank commissioners, and that the assessment was made to recover *unpaid subscriptions* (only forty per cent of the par value thereof having been paid), and that such unpaid

[18] Lum v. American Wheel etc. Co., 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303. The corporation was organized in Arizona, but the "parties conceded" that the laws of Arizona in regard to the non-assessability of stock had no bearing on the case, and the court says: "In view of the agreement of counsel . . . we assume, only for the purposes of this case, that the problem before us is exactly the one which would exist if the defendant were a corporation organized under the laws of California." It is quite evident that the finding of the lower court, that the stock was issued fully paid, and that "at the time of its purchase it was understood and agreed between the plaintiff and the corporation that such stock would continue to be non-assessable," was founded only upon the provisions of its charter; for the supreme court says: "Is an agreement between a corporation and its stockholders, embodied in its Articles of Incorporation and expressed in its certificate, that its capital stock shall not be assessed after it is paid in full, a valid contract as between the stockholders and the corporation?" and holds that it is.

subscriptions were available to the creditors and collectible by assessment in a proceeding solely for the benefit of creditors, notwithstanding a by-law that such subscriptions should not be called except by a two-thirds vote of the stockholders, and declaring that the proceeding was one directly on behalf of the creditors. It will be observed that this case really rested upon the "trust fund theory" of stock subscriptions; that is, that such subscriptions are "assets" of the corporation. But simply the right to levy assessments can not be regarded as an asset in any sense of the word. It would seem to be a fair deduction that a case like the above would be the only one where creditor's rights could be *directly* involved under the doctrine established in Lum v. American Wheel etc. Co., and that where stock had been paid in full and was issued in legal form as non-assessable, it could not be assessed by the directors even to pay debts of the corporation, much less to provide funds for running expenses, capital, etc.

The second case was decided by the district court of appeal and a petition for rehearing was denied by the supreme court. On the sale of the stock by one of the corporation's agents, the vice president stated to the purchaser that it was non-assessable, which was untrue. The court said that, so far as the law contained in Civil Code, sections 331 and 332, is concerned, the levying of an assessment is a matter within the discretion of the directors, and the corporation may contract not to do a discretionary act and, hence, that the stock shall be non-assessable (citing Lum v. American Wheel etc. Co., *supra),* and that the representation that the stock was non-assessable was one of fact and not of law. The court further said that, whether "the representation was within the scope of the agent's authority is immaterial, as it is only necessary that the agent have authority to negotiate the sale of the stock." The

purchaser was permitted to rescind his purchase on account of the false representation, and recovered back the purchase money.[14]

The same reasoning would apply to creditors, as well as to corporations, where the stock had been paid in full; creditors would certainly have no better right to demand an assessment. It should be borne in mind that the other liability of the stockholder—viz.: for his proportionate part of all the debts of the corporation imposed by the constitution—is in no way directly related to assessments under this and the following sections of the code; the creditor may sue the stockholder directly upon the latter's constitutional liability, or for the difference between par and the amount which the stockholder has paid on his stock, but the latter suit is in the nature of a creditors' bill and is for the benefit of all creditors;[15] or, if the directors refuse to make a call for unpaid subscriptions, a court of equity will make it.[16]

MAY BE LEVIED FOR IMPROVEMENTS, EXPENSE OF CONDUCTING BUSINESS, AND TO PAY DEBTS

The liability to assessment under this section of the code differs quite materially from the constitutional and statutory liability of a stockholder for the debts of

14 Browne v. San Gabriel etc. Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544.

15 Welch v. Sargent, 127 Cal. 72, 84, 59 Pac. 319, and cases cited. A late case, however, seems to have been a suit by the creditor in his own behalf, and not for the benefit of all creditors, Herron Co. v. Shaw, 165 Cal. 668, Ann. Cas. 1915A, 1261, 133 Pac. 488.

16 Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420, or, in case of an insolvent bank organized under the act of 1878 and amendments thereto, the directors could make the call, Union Sav. Bank v. Dunlap, 135 Cal. 628, 630, 67 Pac. 1084, and Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441; but the court said under that act the bank continued to be a corporation until its affairs are closed, although the act itself makes no such provision.

a corporation. Under the latter he is liable only for the debts which were contracted while he was a stockholder; and, while he is liable to be assessed under this section to pay such debts, the creditor may [illegible]wait for or depend upon such assessments but may sue the stockholder personally without joining any other stockholders as defendants. But under this section of the code the stockholder is liable not only to assessments for all debts of the corporation, no matter when they were contracted, but also to make improvements, pay current expenses and to raise funds (really capital) for conducting the business.[17]

Levying an assessment to pay a debt which the corporation does not legally owe, and not using the money for that purpose, is not in itself a fraud.[18]

The directors may levy an assessment, for such purposes in excess of a limit fixed in the by-laws, if not in excess of the amount allowed by law.[19] The theory and purpose of the law are that the corporation is not obliged to resort to its property to meet outstanding obligations, but may levy an assessment for that purpose[20] and for repairs to machinery, without which the company could not carry on its business.[21] It was held that the cost of constructing a tunnel into the ground of another mining company, in which the corporation was a large stockholder, "was an investment of capital, and

17 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. 10; Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Green v. Abletine M. Co., 96 Cal. 322, 31 Pac. 100; Sayre v. Citizens' Gas etc. Co., 69 Cal. 207, 208, 7 Pac. 437, 10 Pac. 408, and cases cited in the following notes.

18 Johnson v. Kirby, 65 Cal. 482-487, 4 Pac. 458.

19 Sullivan v. Triunfo etc. Min. Co., 29 Cal. 585, 586, s. c. 39 Cal. 459.

20 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; Taylor v. North Star etc. Min. Co., 79 Cal. 285, 21 Pac. 753.

21 Younglove v. Steinman, 80 Cal. 375, 377, 22 Pac. 189.

not a current expense";[22] however, this was a case to hold the directors responsible for paying dividends while they borrowed money for the purpose of construction of this tunnel. The line demarking "current expense" is sometimes vague and uncertain. The levying of illegal assessments is no ground for the dissolution of the corporation.[23]

DISTINCTION BETWEEN STATUTORY LIABILITY AND LIABILITY TO PAY UP STOCK TO PAR

The liability of a stockholder to be called upon to pay up his shares to par, in case of the insolvency of a corporation, is recognized almost everywhere, and has existed from the earliest times, and the fund realized in this manner becomes a part of what is called the "trust fund" for the benefit of creditors.

But funds realized by enforcement of the liability of stockholders to pay the debts of a corporation never become a part of this "trust fund," nor a part of the assets of the corporation. Therefore it is held that the superintendent of banks can not maintain an action against the stockholders of an insolvent bank to collect from them the amounts due on their statutory liability for the benefit of the creditors of the bank; such suits can be brought only by the creditors directly against the stockholders.[24]

The liability to be assessed upon full paid stock to pay debts of the corporation, much more to raise funds for the ordinary business of the corporation, has practically disappeared in all countries of the world.

[22] Excelsior Water etc. Co. v. Pierce, 90 Cal. 131-145, 27 Pac. 44.

[23] People v. Rosenstein etc. Cigar Co., 131 Cal. 153, 63 Pac. 163.

[24] Williams v. Carver, 171 Cal. —, 154 Pac. 472.

The distinction between the two kinds of liability is clearly preserved in our decisions,[25] and to some extent in the statutes. As an instance: The statutory liability for debts may be satisfied by the stockholder paying directly to the creditor his proportion of the debt (Civil Code, section 322), but he can not satisfy his obligation to pay his stock up to par in this manner.[26]

Nevertheless, it has been said, except as to the limit of the amount of a single levy thereon, there is no distinction between an assessment upon unpaid stock and upon fully paid stock, and the procedure is the same whether it be a "call" upon a subscription, or an "assessment" on paid-up stock, and that sections 331 to 349 are alike applicable to both.[27] No reference is made to the two cases cited below; it does not appear that there was any by-law on this subject in this case.

In proceedings to collect unpaid balances on the par value of shares of an insolvent bank, the directors must make the "call" and carry on the proceedings or suits, and not the bank commissioners; notwithstanding the latter ordered an "assessment," no authority is necessary from the commissioners.[28] Such a proceeding is not one to enforce the statutory liability created in section 322 of the Civil Code, and a by-law of the corporation providing that unpaid balances on par may be called in any moment at the discretion of the directors and to collect the same by suit, instead of following the proceedings provided in the statutes for making and

25 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; Union Savings Bank v. Willard, 4 Cal. App. 690, 694, 88 Pac. 1098; People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329.

26 Welch v. Sargent, 127 Cal. 72, 82, 59 Pac. 319.

27 Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527-531, 99 Pac. 994. See, post, sub-title "Subscription Contracts Different."

28 People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329.

collecting assessments, is valid.[29] But any by-law restricting the power of directors in collecting unpaid balances on stock, inconsistent with the provisions of sections 331 *et seq.* of the Civil Code, is invalid to that extent as to creditors.[30] The fund which may be raised by assessing stock up to par is a trust fund[31] for the benefit of all creditors, and can not be diverted by the stockholder to the payment of a particular creditor; he must pay the money in to the corporation, it to be ratably distributed among the creditors;[32] and in the latter case it was said that the stockholder can not offset a debt due from the corporation to him, against his stockholder's liability, to pay up his shares in full.

LIABILITY STRICTLY CONSTRUED

The liability of a stockholder to the corporation on assessments exists solely by virtue of the statute, and a strict compliance by the corporation with the provisions of sections 331-349 of the Civil Code is necessary to enable the corporation to recover.[33]

So strictly are all such proceedings construed that, in a case where the full board was present at a meeting when it adjourned to a subsequent day, and at the adjourned meeting all the directors were not present, it was held that the adjourned meeting could not resolve

29 People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

30 Union Savings Bank v. Leiter, 145 Cal. 696-702, 79 Pac. 441.

31 Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 583, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; cited, O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 67, 97 Pac. 1.

32 Welch v. Sargent, 127 Cal. 72, 82, 59 Pac. 319, and cases cited.

33 National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505, 507, 88 Pac. 506; San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 493, 41 Pac. 487; Ruck v. Caledonia etc. Min. Co., 6 Cal. App. 356, 360, 92 Pac. 194; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143; Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

to collect the assessment by suit, for the reason that the first meeting could not have made such an order because the time had not yet arrived when it could make the election.[84] And in enforcing assessments it has been held that if only a minority of the directors is present at a regular meeting it has no power, even to adjourn, and if, at such an adjourned meeting at which all the directors are not present, an assessment is levied, the assessment is void.[85] These cases certainly go to the extreme. Stated in general terms it is said that an assessment can be levied by the directors only at a regular meeting, or at a special meeting regularly called.[86]

In suits to collect such assessments there must be allegations and findings of all the facts necessary, under the Civil Code, to create a personal liability on the part of the stockholder.[87]

IMMATERIAL WHEN DEBTS CONTRACTED

It is no defense to an assessment that it is levied to raise funds to pay debts which were incurred before the party to be charged becomes a stockholder.[88]

84 Bank of National City v. Johnston, 133 Cal. 185, 189, 65 Pac. 383. This decision was by a divided court on this point.

85 Raisch v. M. K. & T. Oil Co., 7 Cal. App. 667, 668, 95 Pac. 662.

86 Ibid. and Thompson v. Williams, 76 Cal. 153, 155, 9 Am. St. Rep. 187, 18 Pac. 153; Harding v. Vandewater, 40 Cal. 77, 78. As to what was sufficient notice of a special meeting to uphold a finding that notice was given, see Younglove v. Steinman, 80 Cal. 375, 377, 22 Pac. 189.

87 Shively v. Eureka etc. Min. Co., 129 Cal. 293, 296, 61 Pac. 939.

88 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 109, 88 Pac. 280; Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 533, 99 Pac. 994, and sundry cases in preceding notes.

ONE-FOURTH CAPITAL MUST FIRST BE SUBSCRIBED

While the court says it is well established, in the absence of any provision to the contrary, that a corporation can not levy an assessment upon its stock until the whole amount thereof has been subscribed, this section (331) of the Civil Code permits an assessment if one-fourth of the capital stock has been subscribed. As a consequence, if one-fourth of the authorized capital stock has not been subscribed, any levy upon the subscribed stock is void; this is a condition precedent to the right.[39] Equity will prevent the levy of such an assessment, and also compel the corporation to recognize the owner of the stock and grant him the proper privileges as such (which had been denied in this case).[40]

The provision of this section of the code that one-fourth of the capital stock must be first subscribed is satisfied by the issuance of, and full payment for, certificates for more than one-fourth of the stock.[41] It is evident that the addition of the qualification "and full payment for" is unwarranted; whether or not the shares were paid for does not matter, for acceptance of certificates of stock is equivalent to subscription so far as any and all liabilities of stockholders are concerned.

An evidently inaccurate statement of law on this subject was made in a case where the court used the following language, "appellants are mistaken in supposing that the stockholders are not liable for debts of

[39] San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Ventura etc. Ry. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143; Pettit v. Forsyth, 15 Cal. App. 149, 158, 113 Pac. 892.

[40] Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 68, 65 Pac. 143.

[41] Bell v. Standard Quicksilver Co., 146 Cal. 699, 706, 81 Pac. 17; Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 531, 99 Pac. 994.

the corporation until all the stock is subscribed. When one-fourth of the capital stock is subscribed their liability begins" (citing Civil Code, section 331).[42] What evidently was intended was a liability to assessment by the corporation itself to pay indebtedness, for liability to creditors begins at once upon the creation of the debt.[43]

ACTUAL SUBSCRIPTION NOT NECESSARY

To create this liability, it is not necessary that the party actually subscribe for the stock; it is sufficient if he accepts a certificate of stock,[44] or, indeed, we may say, if he accepts dividends, votes upon it or exercises any other rights of ownership. And, as we have seen, subscriptions to a proposed plan of organization of a corporation, when it is organized in accordance with those plans, is sufficient to establish this liability;[45] the mutual promises of each subscriber are sufficient consideration for each. But where the amount of the subscription in the list contained in the Articles of Incorporation is less than in the preliminary agreement, the amount mentioned in the Articles only can be recovered[46] in assessment proceedings.

42 Walter v. Merced etc. Ass'n, 126 Cal. 582-586, 59 Pac. 136.

43 Civil Code, section 322, and constitution, article 12, section 3; Baines v. Babcock, 95 Cal. 581, 582, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

44 Walter v. Merced etc. Ass'n, 126 Cal. 582, 585, 59 Pac. 136; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 56, 97 Pac. 1.

45 West v. Crawford, 80 Cal. 19, 21 Pac. 1123; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

46 Monterey etc. R. Co. v. Hildreth, 53 Cal. 123; distinguished in Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 444-446, 108 Pac. 308. See, post, sub-title "Subscription Contracts, Different"; also Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 551, 27 Am. St. Rep. 215, 29 Pac. 126.

TRUSTEE LIABLE

The addition of the word "trustee," or "trustee for A. B.," does not relieve the person who subscribes, or to whom a certificate is issued, or to whom it is transferred in this manner, from liability to the corporation (becoming insolvent) to pay up the stock to its par value,[47] although a different rule applies to the direct liability of stockholders to creditors, provided in section 322 of the Civil Code, if the trustee did not voluntarily invest the trust funds in the stock.

WATER COMPANY'S STOCK

Stock in so-called mutual water companies is no exception to the rule of liability for debts of the corporation,[48] but how an assessment could be enforced by sale of the stock where the stock is appurtenant to land is not clear; the corporation may, however, enforce it by personal suit against the stockholder, the same as in any other case.

PERSONAL LIABILITY TO SUIT FOR AMOUNT

Under section 349, considered hereafter, the corporation may waive a sale of the stock and bring suit against the stockholder to collect the amount of the assessment. Two remedies are open to the corporation. But the election by the corporation to sue the stockholder personally must be made at that stage of the proceedings when its right to sell the stock is secured, and while the right is still in existence—not lost by failure to keep its proceedings alive.[49]

47 Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098.

48 Civil Code, sections 322, 331; Richey v. East Redlands Water Co., 141 Cal. 221, 227, 74 Pac. 754.

49 Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 532, 99 Pac. 994.

PURCHASERS OF UNPAID STOCK

One who purchases unpaid, or partially unpaid, stock and has the transfer made on the books of the company to himself is liable for all assessments made thereafter on such shares;[50] and this is true also of stock bought at a sale by the corporation to collect an assessment, which shares the corporation[51] has thereafter sold to an individual.

TRANSFEREES ON BOOKS ONLY PERSONS LIABLE

For the purpose of ascertaining those who are liable to it for the amount of an assessment, the corporation can look only to the list of stockholders as they are registered upon its books.[52] A stockholder can not divest himself of this liability by an assignment of the certificate to another after the levy of the assessment, especially if the purchaser does not obtain a transfer of the stock to himself upon the books of the corporation.[52] Why the last clause was added by the court is not clear.

Where the certificate of stock was issued the same day the assessment was levied, the purchaser is liable, for there can be no presumption that the purchase was made a fraction of a day prior to the purchase.[53]

VALIDITY OF MEETING LEVYING ASSESSMENT

An assessment levied at an adjourned meeting of which the hour was not named in the notice, two of the

50 Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809; Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711.

51 O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-72, 97 Pac. 1.

52 Visalia & T. R. Co. v. Hyde, 110 Cal. 632-636, 52 Am. St. Rep. 136, 43 Pac. 10; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106-109, 88 Pac. 280.

53 San Gabriel Valley Land etc. Co. v. Dennis, 4 Cal. Unrep. 272, 34 Pac. 441.

directors not being present at either meeting, is invalid; in case of such an adjournment, notice of the adjourned meeting must be given.[54] In the absence of a provision in the by-laws in regard to notices of special meetings, personal notice must be given to each director,[55] or the provisions of section 301 of the Civil Code be followed. If the regular meeting occurs on a holiday and there is no meeting that day, a meeting and assessment the following day is void.[56]

SUBSCRIPTION CONTRACTS DIFFERENT

In a line of cases where subscriptions were made for the stock of corporations to be formed, in which subscriptions it was agreed that they should be paid in larger amounts and more rapidly than is provided in these sections of the statutes for making assessments, it was held not only that these agreements were upon a good consideration—viz.: The mutual agreements of the subscribers—notwithstanding the corporation was not a party to the agreements and was not named in the subscriptions and was not then in existence,[57] which is supported by high authority, but also that the subscriptions could, and really must, be collected according to the terms or conditions contained in the subscriptions and not under these sections of the statutes concerning assessments, and that such subscriptions are not illegal as against public policy, nor do they contravene any

54 Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153.

55 Harding v. Vandewater, 40 Cal. 77.

56 Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

57 Marysville etc. Power Co. v. Johnson, 93 Cal. 538-546, 27 Am. St. Rep. 215, 29 Pac. 126; cited in Kohler v. Agassiz, 99 Cal. 9, 15, 33 Pac. 741. But if the corporation formed includes additional purposes, the subscriber is not bound, Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308, and cases cited.

statute.[58] The corporation, subsequently organized, may collect the subscriptions; they inure to the benefit of the corporation.[59] If these subscriptions provide for payments in excess of ten per cent at one time, the full amount so agreed to be paid may be collected at once, notwithstanding the limitations in the statutes of assessments to ten per cent.[60] If the subscription is on a separate paper stating that it is to the "project mentioned on the annexed list of subscribers" (the principal and original list), but the original list was not actually annexed to the paper subscribed, the times of payment of the subscription, notwithstanding, are fixed by the terms of the original list.[61] If there is no stipulation in the subscription contract the assessments are limited to the amounts, and the collection to the manner, provided in the sections of the Civil Code, 331 *et seq.*[62]

A by-law that 30 per cent of the par value of each share shall be paid up, and that no further calls for payments upon the capital stock shall be made except by a two-thirds vote of all issued and outstanding stock can not, in case of insolvency of the corporation, defeat this power.[63]

It was said *(dictum)* that the subscriber, by the terms of his subscription, may vary his liability from that

58 West v. Crawford, 80 Cal. 19-29, 21 Pac. 1123; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 446, 108 Pac. 308.

59 San Joaquin Land etc. Co. v. West, 94 Cal. 399-404, 29 Pac. 785; Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308; Ferrochem Co. v. Danziger, 23 Cal. App. 584, 138 Pac. 966.

60 West v. Crawford, 80 Cal. 19, 27, 21 Pac. 1123.

61 Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810.

62 Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-69, 70, 97 Pac. 1; Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527-531, 99 Pac. 804.

63 Union Sav. Bank v. Leiter, 145 Cal. 696, 700, 79 Pac. 441.

which exists, by virtue of the statute;[64] that his liability is measured by the terms of his agreement. The facts in the case in which this was said were that the subscribers agreed to "pay the amount in cash named, to-wit: Ten per cent of the stock by us subscribed to the treasurer of the corporation." This amount was paid in but, one-fourth of the capital not having been subscribed, the corporation having incurred debts, forty per cent was demanded further from the subscribers in order to liquidate them. The court held this subscription agreement did not bind the subscribers to pay anything further on the stock, except as assessments might be legally made, and that no assessment could be made by the corporation in this case, though it owed pressing obligations, because one-fourth of its capital had not been subscribed.

In harmony with this view is the language of the court in a case where the amount of the subscription was to be paid in monthly sums "in case it is required," where the court said, "if the subscription paper was signed after the corporation was formed . . . the plaintiff (the corporation) has no power to treat the subscribers differently from other stockholders, or to recover from them other than the amounts of assessments duly levied."[65]

Moreover, if the subscription precedes the formation of the corporation, and the name of a subscriber with the amount of his subscription is not inserted in the Articles of Incorporation, the corporation can not enforce the subscription against him by assessment

[64] Ventura etc. Ry. Co. v. Hartman, 116 Cal. 260, 263, 48 Pac. 65.

[65] California Sugar Mfg. Co. v. Schafer, 57 Cal. 396, 398. In other respects this case is directly opposed to those above referred to, notwithstanding the attempt to distinguish it in Marysville etc. Power Co. v. Johnson, 93 Cal. 538, 550, 27 Am. St. Rep. 215, 29 Pac. 126.

proceedings.[66] But it is not necessary that each subscriber for stock sign the Articles of Incorporation; it is enough if his name be inserted in the Articles; those who sign act as the agents of the others.[67] This, of course, would be on condition that no additional or different powers from those mentioned in the subscription are inserted in the Articles.[68]

But, in a case where rights of creditors are involved, it was said by the court that a subscription or contract of purchase, whichever it might be, to pay for the stock one dollar "every month for thirty-four months" was not a contract of purchase but was "designed to relieve the corporation from the necessity of making calls and assessments upon the stock,"[69] and, the corporation becoming insolvent, at the suit of creditors, the subscribers were compelled to pay up their shares to par in one assessment.

There are many authorities in other states to the effect that such subscriptions can not be collected until all the stock is subscribed, and the authorities everywhere agree that a condition in a subscription that it shall not bind the subscriber until a stated number of shares are subscribed is valid. These instances differ widely from those we have been describing; but they are either subscriptions or they are not. If they are subscriptions they should be what the law requires of a subscription. They should all be alike, and not be sub-

66 Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123. But this case was distinguished when the subscriber afterwards made partial payments on the stock, Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442, 444-446, 108 Pac. 308. But see, ante, sub-title "Actual Subscription Not Necessary."

67 San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 74-79, 35 Pac. 349.

68 Marysville etc. Power Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

69 Tulare Savings Bank v. Talbot, 131 Cal. 45-49, 63 Pac. 172.

ject to any variation of terms and obligations imposed by the subscriber; if they contain such variations they should not be legally acceptable.

The reasoning underlying these decisions is just as applicable to subscriptions made after a corporation is formed as those made in contemplation of its formation. Indeed, they become subscriptions after the corporation is formed if, when the corporation is formed, it adopts or accepts them. This principle would admit of different shares being called upon for payment of different sums and at different times, thus making shares unequal in amount, and creating different liabilities as to assessments and making fair and equal dividends impossible; for it is one of the first principles in the composition of corporations that the shares are equal and identical with each other, and each share is entitled to the same dividend as every other share. The case of a going corporation selling its stock below par is different, for, as to the corporation and the stockholders, they are full paid; the transaction is the act of the stockholders themselves, by or through their officers, and they can not be heard to complain of their own acts; creditors may attack the transaction, but stockholders can not.

UNEQUALLY PAID STOCK

Where a part of the issued stock of a corporation is issued as full paid (for property) and the remainder is issued without any payment thereon, assessments levied by the corporation must be laid first on those shares upon which nothing was paid, until they are paid in full, before any assessments can be levied upon the shares paid up in full at the time of their issue.[70] Before the amendment of 1905 to section 323 of the Civil Code, the issue of certificates of stock upon which no state-

70 O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 97 Pac. 1.

ment is made that they are not paid up in full does not estop the corporation from asserting that the stock was not full paid, even as against an innocent purchaser from the original holder, as stock certificates are not negotiable instruments.[70] Otherwise assessments must be equal upon all shares.[71] What is the effect of the amendment and a statement in the certificate, that the shares are full paid when they are not, has not been squarely decided, but in a case where stock has been sold as non-assessable it can not be assessed.[72]

LIEN ON STOCK FOR ASSESSMENTS

The courts have said that "under our statutes, the only lien given to corporations for profit upon their subscribed capital stock, which does not depend upon the possession of the certificate of stock, is to secure the payment of the assessments levied for the purpose of paying expenses, conducting business, and paying debts" (Civil Code, section 331),[73] but "the lien, however, is upon the shares, and not upon the certificate,"[74] which are certainly inaccurate statements, especially as these and other cases hold that, even after an assessment is levied, a corporation can not prevent a transfer on the books of the corporation, and a transfer on the books of the company transfers the shares and not simply the certificate, and the section of the code referred to makes no mention whatever of a lien. Liability to assessment is really a quality inherent in

71 Kohler v. Agassiz, 99 Cal. 9, 15, 33 Pac. 741; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 67, 65 Pac. 143; a correct statement of law, but dictum in both cases.

72 Lum v. American Wheel etc. Co., 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303.

73 Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600-603, 23 Pac. 134.

74 Craig v. Hesperia Land etc. Co., 113 Cal. 7-12, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

the shares, a contained condition, in whosover hands the shares exist, or to whomsoever they may come, unaffected by any doctrine of negotiability; in default of payment the shares fall into the corporation and cease to exist, until they are given life again by a resale upon a new consideration.

This lien does not have the character of a mortgage which, under section 726 of the Code of Civil Procedure, would prevent the corporation suing the stockholder, to collect an assessment or to enforce the stockholder's liability to pay up his shares to par.[75] In an earlier case it was said the corporation has no vendor's lien upon shares sold by it upon which installments of the purchase price have not been paid.[76]

ISSUANCE OF CERTIFICATE NOT NECESSARY

It is quite well settled that the actual issuance of the stock certificate is not necessary to make the owner of the shares liable for the assessment.[77]

DIRECTOR ESTOPPED—WHEN

If a director votes for a resolution levying an assessment on the stock of the corporation he is estopped from denying its validity, and so is his assignee.[78]

WHEN A SUBSCRIBER NOT A STOCKHOLDER

It was said in one case that subscription is not proof that the subscriber owns the stock, in order to charge

[75] People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[76] Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

[77] Mitchell v. Beckman, 64 Cal. 117, 121, 28 Pac. 110; California Southern Hotel Co. v. Callender, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. 859; Pacific Fruit Co. v. Coon, 107 Cal. 447-452, 40 Pac. 542.

[78] Campbell v. Santa Maria Oil etc. Co., 153 Cal. 282, 95 Pac. 39.

him with liability for the debts of the corporation, when the subscription was to be paid in cash and he had never paid or offered to pay for the stock.[79] This is hardly a correct statement of the law.

CONTRACT TO PROTECT STOCK FROM ASSESSMENTS

A contract to protect stock from assessments, and to pay them if any should be made, is enforceable, and, if broken, and the stock be sold thereunder to the corporation, the former owner of the stock may recover, from the obligor in the contract, the value of the stock at the date of the sale.[80]

LIMITATION OF AMOUNT OF LEVY

Section 332 of the Civil Code is as follows:

> **§ 332.** No one assessment must exceed ten per cent of the amount of the capital stock named in the Articles of Incorporation, except in the cases in this section otherwise provided for, as follows:
>
> 1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount;
>
> 2. The directors of railroad corporations may assess the capital stock in installments of not more than ten per cent per month, unless in the Articles of Incorporation it is otherwise provided;
>
> 3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper. (Enacted March 21, 1872.)

[79] Bank of Yolo v. Weaver, 3 Cal. Unrep. 569, 31 Pac. 160. This case was ordered not to be published in the official reports.

[80] Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892.

The general limitation of the amount of the assessment is ten per cent of the authorized capital stock—not simply ten per cent of the par value of the stock which has been issued. As assessments may be levied after one-fourth of the capital is subscribed, an assessment for ordinary purposes, even as limited by this section, might equal 40 per cent on the par value of the subscribed stock.[81] With the exception of a case where the corporation is unable to meet its liabilities, the limitation of the amount of a single assessment is the same upon unpaid stock and stock which is full paid, and, as we saw in cases cited under the preceding section, the proceedings to collect both are the same; sections 331 to 339 are applicable to each,[82] although it was said that if a by-law authorized suit to collect assessments or calls upon unpaid stock the by-law was valid.[83] Yet such a by-law can not operate to the prejudice of creditors, either in the power and duty to make such assessments, or in the amount thereof.

No statute of limitations runs against the right to make such a levy "so long as the corporation is a going concern for purposes of liquidation," nor as to the collection of the same, until the actual levy is made.[84]

It was said, in a case arising under the old banking act, that a levy made for the purpose of paying debts

81 Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

82 Bottle Mining etc Co. v. Kern, 9 Cal. App. 527, 531, 99 Pac. 994; Union Sav. Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084; Union Sav. Bank v. Leiter, 145 Cal. 696, 701, 79 Pac. 441.

83 People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029; People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329.

84 Union Sav. Bank v. Leiter, 145 Cal. 696, 702-704, 79 Pac. 441; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383, is distinguished in Union Sav. Bank v. Dunlap, 135 Cal. 628, 630, 67 Pac. 1084.

was rendered void by a subsequent adjudication of insolvency.[85]

And we have also seen that, if the contract of subscription provides for payments in larger amounts, the terms of the contract may be enforced[86] and assessments may be levied on stock fully paid.[87]

Where an assessment exceeds ten per cent of the capital of the corporation the burden is on the corporation to show that the assessment comes within some of the exceptions to the limitation; as an instance, if there is no proof that the stock has not been fully paid an assessment exceeding ten per cent of the authorized capital will be presumed to be void.[88]

If a part of the stock is not fully paid it should be assessed before that which is fully paid, and, if necessary to raise the funds, up to an amount sufficient "to equalize the subscriptions on all stock."[89] This declaration of law does not rest upon any statutory provision, but is really founded on equitable considerations and probably on the common law rule that, although full paid stock could not be assessed, stock which was not full paid was subject to calls until it was paid in full. No discussion of the reasons or the law is contained in the case last cited, and it excites some astonishment that this question should not have been raised until so late a day, and also that no statutory declaration on that subject should have been made. The decision establishes a sound principle.

85 Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383.

86 Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442-446, 108 Pac. 308, and cases cited under preceding section.

87 Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802, and other cases.

88 Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

89 O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53, 69, 97 Pac. 1.

Another limitation on the right of assessment is contained in the next section of the Civil Code, which prohibits the levy of an assessment while any portion of a previous one remains unpaid, except in certain cases mentioned in the section.

There is no limitation on the number of assessments which may be made; the number may be infinite. The stockholders have no voice in the matter whatever.

As to railroads, an assessment on the capital stock not in excess of ten per cent may be made as often as one a month, whether previous assessments are paid or not.

NONE UNTIL PREVIOUS ONE PAID

Section 333 of the Civil Code is as follows:

> § 333. No assessment must be levied while any portion of a previous one remains unpaid, unless:
>
> 1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment;
>
> 2. The collection of the previous assessment has been enjoined; or,
>
> 3. The assessment falls within the provisions of either the first, second, or third subdivision of section 332. (Enacted March 21, 1872.)

When the exceptions mentioned in this section are considered, the effect of the section is only to limit assessments for paying expenses and conducting the business to cases where "any portion of a previous one remains unpaid."

What is meant by the first subdivision of this section, when considered with reference to the introductory clause, is not clear, for purchase by the corporation at the sale operates as a payment of the assessment on

those shares. It has never been interpreted by the courts.

If a former assessment was waived and rescinded, the power of the directors to levy another assessment under subdivision 1 of section 332, *supra,* was not exhausted,[90] nor if a portion of a previous assessment was liquidated by offsetting an illegal salary of the president against the assessment on his stock.[91]

WHAT ORDER OF ASSESSMENT MUST CONTAIN

Section 334 of the Civil Code is as follows:

> **§ 334.** Every order levying an assessment must specify the amount thereof, when, to whom, and where payable; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent. (Enacted March 21, 1872.)

It is said "the proceedings by which the property of a stockholder is declared forfeited, without suit, or personal notice of any kind, must be strictly construed. All the conditions precedent to such forfeiture must exist," and, where the order of sale failed to state the place where the assessment was payable, the assessment and subsequent sale of the stock were void.[92] New dates of maturity, delinquency and sale may be fixed by resolution, under section 346 of the Civil Code;[93] nor is it any objection that the new date of delinquency is

[90] Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

[91] Strouse v. Sylvester, 6 Cal. Unrep. 798, 66 Pac. 660.

[92] Ruck v. Caledonia etc. Min. Co., 6 Cal. App. 356, 358, 92 Pac. 194.

[93] Smith v. Gate City Oil Co., 160 Cal. 446, 117 Pac. 525; Shannon v. Tooker, 167 Cal. 484, 140 Pac. 10.

more than sixty days after the resolution levying the assessment.

NOTICE OF ASSESSMENT—FORM

Section 335 of the Civil Code is as follows:

§ 335. Upon the making of the order, the secretary shall cause to be published a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given, that at a meeting of the directors, held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom, and where). Any stock upon which this assessment shall remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the (day appointed), to pay the delinquent assessment, together with costs of advertising and expenses of sale.

(Signature of secretary, with location of office.)

(Enacted March 21, 1872.)

A notice which stated that an assessment of ten dollars a share had been levied upon the "capital stock" of the corporation, when the levy was in fact on the subscribed capital stock (as limited in section 331) is, notwithstanding, good; the legislature having the power to prescribe the form of notice, and having done so, the notice corresponding therewith was sufficient.[94]

If the pleading fails to raise the point that the secretary never certified to the notice, the point can not be raised afterward.[95]

[94] San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 81, 35 Pac. 349.

[95] Union Sav. Bank v. Rinaldo, 6 Cal. App. 637, 92 Pac. 873.

NOTICE OF ASSESSMENT—PUBLICATION AND SERVICE

Section 336 of the Civil Code is as follows:

> § 336. The notice must be personally served upon each stockholder, or, in lieu of personal service, must be sent through the mail, addressed to each stockholder at his place of residence, if known, and, if not known, at the place where the principal office of the corporation is situated,
>
> And be published once a week, for four successive weeks, in some newspaper of general circulation and devoted to the publication of general news, published at the place designated in the Articles of Incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if a paper be published therein.
>
> If the works of the corporation are not within a state or territory of the United States, publication in a paper of the place where they are situated is not necessary.
>
> If there be no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and, if there be none, then in a newspaper published in an adjoining county. (Amended March 30, 1874; amendts. 1873-4, p. 206.)

The statute does not prescribe any time before or after which this notice shall be published. The court, construing a complaint which alleged that "upon making the resolution as aforesaid" (the order mentioned in the preceding section) and that the notice was published at the places and for the duration of time required by the statute, held the complaint sufficient.[96] Where the stockholder had actual notice of the sale, the failure to publish this notice in a county where a part of the corporation's irrigation canal was located was

[96] Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 532, 533, 99 Pac. 994.

held not material.[97] Also where notices were mailed to the stockholder it is presumed that they were received, if there is no denial of that fact.

DELINQUENT NOTICE—FORM

Section 337 of the Civil Code is as follows:

> § 337. If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published, in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:
>
> (Name in full. Location of principal place of business.) NOTICE.—There is delinquent upon the following described stock, on account of assessment levied on the (date), (and assessments levied previous thereto, if any) the several amounts set opposite the names of the respective shareholders, as follows: (Names, number of certificate, number of shares, amount). And in accordance with law (and an order of the board of directors made on the [date], if any such order shall have been made), so many shares of each parcel of such stock as may be necessary, will be sold, at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale. (Name of secretary, with location of office.) (Enacted March 21, 1872.)

If the publication of this notice is not begun at least fifteen days before the day appointed for the sale, it, and all proceedings thereafter, are invalid; after that time has arrived, if the publication has not begun, the directors do not have even the power to waive further proceedings in the matter of the sale of the stock and

[97] Stephens v. Lemoore Canal etc. Co., 22 Cal. App. 579, 587, 588, 135 Pac. 707.

to sue the owner personally.[98] All proceedings subsequent to levying the assessment must be begun anew.

The directors have the power, under this section, to order the publication of this notice to be made in a different newspaper from the one, or ones, in which the notice of the order levying the assessment (sections 334, 335, 336) was published; if they do not make such an order it must be published in the same newspapers.[99] If also served by mail, if the notice is not mailed until the day the trustees could bring suit for payment, it is sufficient.[100]

DELINQUENT NOTICE—FURTHER CONTENTS

Section 338 of the Civil Code is as follows:

> § 338. The notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon, together with the fact that the certificates for such shares have not been issued, must be stated. (Enacted March 21, 1872.)

HOW PUBLISHED—TIME

Section 339 of the Civil Code is as follows:

> § 339. The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first

[98] San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 495, 41 Pac. 487; Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 532, 99 Pac. 994.

[99] Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 8, 41 Pac. 809.

[100] People's Home Sav. Bank v. Rauer, 2 Cal. App. 445-449, 84 Pac. 329.

publication of all delinquent sales must be at least fifteen days prior to the day of sale. (Enacted March 21, 1872.)

As we have seen under a preceding section, if the election to sue the stockholder is not made fifteen days before the day fixed for the sale, and this publication has not begun, the directors lose all jurisdiction to proceed further, not only to sell the stock but also to make the election to sue the stockholder personally to recover the amount of the assessment, as provided in section 349; they must begin all proceedings anew after the order levying the assessments,[101] if sufficient time yet remains.

JURISDICTION ACQUIRED BY PUBLICATION

Section 340 of the Civil Code is as follows:

§ 340. By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale. (Enacted March 21, 1872.)

SALE AT PUBLIC AUCTION

Section 341 of the Civil Code is as follows:

§ 341. On the day, at the place, and at the time appointed in the notice of sale, the secretary must, unless otherwise ordered by the directors, sell or cause to be sold at public auction, to the highest bidder for

101 San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 495, 41 Pac. 487; National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506. See, also, Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 532, 99 Pac. 994. Neither of these cases refer to Burham v. San Francisco Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 939, to which they are both opposed on principle.

cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessment. (Enacted March 21, 1872.)

HIGHEST BIDDER THE PURCHASER

Section 342 of the Civil Code is as follows:

§ 342. The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation, on payment of the assessment and costs. (Enacted March 21, 1872.)

Where a corporation sells stock to pay an assessment, it acts as the agent of the delinquent stockholder, and the purchaser acquires only the stockholder's title, subject to any liability for unpaid subscription price.[102] A director may purchase at such sale for his own personal benefit.[103]

IN DEFAULT OF BIDDERS, CORPORATION MAY PURCHASE

Section 343 of the Civil Code is as follows:

§ 343. If, at the sale of stock, no bidder offers the amount of the assessments, and costs and charges due, the same may be bid in and purchased by the corporation, through the secretary, president, or any director thereof, at the amount of the assessments, costs, and charges due; and the amount of the assessments, costs, and charges must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation must be made on the books thereof.

[102] O'Dea v. Hollywood etc. Ass'n, 154 Cal. 53-72, 97 Pac. 1.

[103] Stephens v. Lemoore Canal etc. Co., 22 Cal. App. 579, 135 Pac. 707.

> While the stock remains the property of the corporation, it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation. (Enacted March 21, 1872.)

In a case involving the obligation of subscribers to an agreement preliminary to the formation of a corporation, agreeing "to take" and "subscribe" for shares of stock in it, the court cites this and the following section in support of its statement that "the presumption is that the corporation had no stock to sell."[104] But the sections cited are not in point, and the conclusion is a *non sequitur*.

If a director purchases stock at such sale for his personal benefit, an agreement made subsequent thereto with the corporation to hold it for the benefit of the corporation and to turn it over to the corporation upon reimbursement of the amount paid by him is void, because without consideration, and in violation of law;[105] and the fact that the purchaser is a director raises no presumption that he is acting for the corporation in making the purchase.

STATUS, AND SALE, OF STOCK PURCHASED BY CORPORATIONS

Section 344 of the Civil Code is as follows:

> § 344. All purchases of its own stock made by any corporation vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority

[104] California Sugar Mfg. Co. v. Schafer, 57 Cal. 396-398.

[105] Stephens v. Lemoore Canal etc. Co., 22 Cal. App. 579, 135 Pac. 707; see, also, Lemoore Canal etc. Co. v. McKenna, 163 Cal. 736, 127 Pac. 345, which, strangely, was not cited in the above case.

of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting. (Enacted March 21, 1872.)

Stock sold by an illegally elected board, upon an assessment not legally levied, is ineffective for any purpose,[106] but a sale by a *de facto* board may be valid. While no reference was made to section 346, post, yet such a case is clearly not one of no substantial error. Nor can a corporation defend its title to stock bought in by it at an assessment sale on the ground that the stock has no value; at least it entitles the owner to the privileges of a stockholder, making the case differ in that respect from a suit against the corporation for conversion of the stock.[107]

Independent of this section, any stock in a corporation, owned, so to speak, by the corporation itself, whether it be a part of its authorized capital stock not taken or subscribed for, or shares lawfully purchased by the corporation, has no existence. There exists merely a right to issue it, by the corporation, for a lawful consideration; the stock is not even a potentiality, as stated in one case, for the potentiality exists in the corporation only. Such shares are not capital; neither are they, strictly speaking, capital stock; a power exists in the corporation to make them capital stock, to create them by a sale and issue of them. Being nothing but a possible product of a power not yet exercised, that is to say, nothing at all, they are nowhere subject to attachment, sale on execution, or similar judicial process, nor can they be voted on by any

[106] Whitehead v. Sweet, 126 Cal. 67-74, 58 Pac. 376; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

[107] Raisch v. M. K. & T. Oil Co., 7 Cal. App. 667-671, 95 Pac. 662.

person, the corporation itself included. The declaration of these sections on this subject are no more than declarations of the law already existing.

Our supreme court has said, interpreting this section, that this stock "is not subject to resale on execution against the corporation" and it "has no interest which it could sell and dispose of, and it had no interest which a creditor could dispose of by forced sale."[108]

Notwithstanding the language of this section denies the right to vote only to stock "held by the corporation by purchase," the supreme court, quoting this language, said, "as stock or shares which have never passed to the ownership of stockholders, or, having so passed, have again been purchased by the corporation, can not be voted or represented by either the corporation or by stockholders, they are not taken into consideration in determining majorities. . . . when stock is spoken of it must be construed to mean shares which have passed from the corporation and which may be voted."[109] The case before the court was that part of the authorized capital which had never been issued; the correctness of the decision rests really upon the general principles of the law, and not upon the provisions of this section.

It is commonly admitted that stock which was once legally issued, afterward lawfully purchased by or donated to the corporation, may be sold for less than par,[110] although there are few decisions on this point, and none in this state (except generally as to original issues), so far as we have found. The language of this section, as to stock purchased on assessment sales, that the stock-

108 Robinson v. Spaulding Gold and Silver Min. Co., 72 Cal. 32, 13 Pac. 65.

109 Market St. Ry. Co. v. Hellman, 109 Cal. 571, 588, 42 Pac. 225.

110 Cook on Corporations, section 29.

holders (note: not directors) "may make such disposition of the same as they deem fit," in accordance with the by-laws or a vote of the remaining shares, undoubtedly gives the right to sell such stock below par. If so, the holder thereof could not be sued, even by a creditor, for the difference between par and the amount paid by him for the shares.

EXTENSION OF TIME OF DELINQUENT SALE

Section 345 of the Civil Code is as follows:

> § 345. The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time for not more than thirty days, by order of the directors, entered on the records of the corporation, or by the secretary, or assistant secretary, of the corporation when delinquent sale is restrained by order of court, or by judge thereof; but no order extending the time for the performance of any act specified in any notice is effectual, unless notice of such extension or postponement is appended to and published with the notice to which the order relates. (Enacted March 21, 1872, and 1913, p. 229.)

This section has been construed to mean that the aggregate of all extensions shall not exceed thirty days from the date fixed in the order levying the assessment for the sale, and not that an indefinite number of extensions for not more than thirty days each may be made.[111] In this case, the adjournments having exceeded thirty days, the right to sell the stock having been lost before the election to sue the stockholder personally was made, the right to make this election was also lost.

111 National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505-508, 88 Pac. 506; but see Smith v. Gate City Oil Co., 160 Cal. 446, 117 Pac. 525.

ASSESSMENT NOT INVALID FOR CERTAIN ERRORS

Section 346 of the Civil Code is as follows:

> § 346. No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew. (Enacted March 21, 1872.)

Where only thirteen days' notice of the day of sale was given (section 339 requiring fifteen days' publication), the sale was not wholly void. The court said that "it is intended thereby to declare that the irregular proceedings shall be inoperative to confer an indefeasible title to the stock as against the owner, who shall make tender of the assessment, and bring suit for its recovery within the time prescribed in section 347," and, the assessment being valid, and the stockholder making no offer to pay the assessment, an injunction restraining the sale was refused.[112] But, there being a failure to make the election on the day the stock became delinquent, or before fifteen days prior to the day fixed for the sale, the failure to begin this publication fifteen days before the sale, as we have already observed, not only destroys the power to sell the stock, but also the right to elect to sue the stockholder personally to recover the amount of the assessment, and no cause of action exists against the stockholder to recover the amount of the assessment.[113] No reference is made to

112 Burham v. San Francisco Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 939; cited in Stephens v. Lemoore Canal etc. Co., 22 Cal. App. 579, 586, 135 Pac. 707.

113 San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Bottle Mining etc. Co. v. Kern, 9 Cal. App. 527, 532, 99 Pac. 994. See distinction drawn in Smith v. Gate City Oil Co., 160 Cal. 446, 117 Pac. 525.

the case cited above. The two cases are irreconcilable on principle. The former holds that the sale is not absolutely void, and that a sale will not be enjoined except upon payment or tender of the amount of the assessment, while the latter declares that there is no power whatever to sell the stock, and therefore the right to elect to sue the stockholder for the amount of the assessment is also lost. The case rests mostly on a constricted definition of the word "waive" in section 349 (a delicate point on which to poise the structure), arguing that there was nothing to waive, hence no opportunity to choose something else; but the provisions of this section and of the following one (347), and the rights declared in Burham v. San Francisco, *supra,* certainly establish that there were rights existing which could be waived.

But if some of the publications be not made, all proceedings subsequent to the assessment become void, but the assessment itself does not become so; a resolution fixing new dates of maturity, delinquency, and sale may be passed and new notices in accordance therewith may be given, notwithstanding the same are more than sixty days after the date of the original resolution levying the assessment.[114]

ACTION FOR RECOVERY OF STOCK SOLD

Section 347 of the Civil Code is as follows:

> **§ 347.** No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold,

[114] Smith v. Gate City Oil Co., 160 Cal. 446, 117 Pac. 525; also Shannon v. Tooker, 167 Cal. 484, 140 Pac. 10.

> together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made. (Enacted March 21, 1872.)

Reference is made to the cases cited and considered under the preceding sections.

This section concerns the remedies only where the sale has been irregular. If there was no power to levy the assessment, as where one-fourth of the capital stock had not been subscribed, the assessment, and all proceedings founded on it, are void.[115] It was stated that this was not an action to recover the stock sold, nor was it an action to recover damages for its conversion. What it was is not clear. The prayer asked for such relief as to the court may seem proper, the plaintiff complaining that the corporation would not permit him to enjoy the privileges or benefits of a stockholder. The opinion quotes authorities to the effect that equity will grant relief, or that the plaintiff may sue in *mandamus* to compel the corporation to register his stock, or that he may sue the company for the value of the shares, and concludes with a judgment overruling the demurrer to the complaint.

It was expressly decided that neither the limitation prescribed in the above mentioned section nor the one contained in subdivision 2 of section 341 of the Code of Civil Procedure are applicable to a case where it is claimed that the sale is void—not simply irregular; if such a suit is brought within two years there is no laches.

115 Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64-66, 65 Pac. 143, or where the meeting was held on an irregular day without notice to all the directors, Cheney v. Canfield, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

In a case where the amended complaint was not filed until a year and a half after the sale, it not appearing when the original complaint was filed, the court said "we may not assume that it was filed in time to satisfy the statute."[116] But the effect of this is to assume that it was not so filed.

It was also said in this case that, where the sale was made to an individual, a tender of the amount due should be made to the purchaser, and that one made to the corporation was ineffective; and that excusable neglect in paying the assessment which might have been good against the corporation, had it been the purchaser, is not available against an individual purchaser.

It is also a mere irregularity to reduce the assessment from ten per cent to five per cent, even after the same had become delinquent.[117] It was said in this case *(dictum)* that the corporation could not increase the amount, which is true, of course, on general principles; also that the complaining stockholder, having himself as a director made the motion to reduce the assessment, was estopped from relying thereon in his suit against the corporation for conversion of the stock.

In a case where a corporation assessed stock, there being no bidders at the sale, the stock being bought in by the corporation which afterward sold the stock to sundry of its stockholders, the original owner brought suit to compel the purchasers to transfer the shares to him. The reasons for his claim do not clearly appear in the opinion of the court, but the court held that the acquiescence of the original owner in what was accomplished by the proceedings until the shares had

116 Stephens v. Lemoore Canal etc. Co., 22 Cal. App. 579, 586, 135 Pac. 707.

117 Ward v. California Celery etc. Co., 15 Cal. App. 84, 87, 113 Pac. 888.

increased greatly in value (the actual time does not appear) barred his right of recovery.[118]

If the stockholder fails to tender the interest, as well as the principal, due upon the sums paid by the purchaser, he acquires no rights under this section to set the sale aside and recover the stock.[119]

Where the validity of an assessment is assailed in the defense to a suit by the corporation on a note given by the stockholder for the amount of an assessment, a justice of the peace has jurisdiction when the amount of the note is not in excess of his jurisdiction, and may determine all questions as to the validity of the assessment in determining the validity of the note.[120]

CONVERSION, MEASURE OF DAMAGES

Where a corporation has improperly sold stock on an assessment, and the original owner elects to sue the corporation and the purchaser for conversion, the measure of damages is the value of the stock at the time of the conversion, and not its par value.[121]

PLEADING

In a suit to set aside the sale and recover back the stock the specific facts establishing the invalidity of the

118 Sayre v. Citizens' Gas Light & Heat Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408.

119 Campbell v. Santa Maria Oil etc. Co., 153 Cal. 282-285, 95 Pac. 39; Shannon v. Tooker, 167 Cal. 484, 140 Pac. 10. See discussion in this case of an offer of payment and a refusal to accept, without the actual tender of money, being equivalent to a full, formal tender. Nor can he maintain a suit for the conversion of the stock by the corporation without making this tender, Ward v. California Celery etc. Co., 15 Cal. App. 84, 88, 113 Pac. 888.

120 Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

121 Myers v. Chittyna etc. Co., 20 Cal. App. 418, 129 Pac. 469.

sale must be set out; allegations in general terms of illegality are not sufficient.[122]

PROOFS OF PUBLICATION AND SALE

Section 348 of the Civil Code is as follows:

§ 348. The publication of notice required by this article may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates signed by the secretary and under the seal of the corporation are prima facie evidence of the contents thereof. (Amended March 30, 1874; amendts. 1873-4, p. 207. Publication: Section 339, Civil Code.)

WAIVER OF SALE—SUIT TO RECOVER ASSESSMENT

Section 349 of the Civil Code is as follows:

§ 349. On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof. (Enacted March 21, 1872.)

After quoting the above section the court said, "it will be perceived that the Civil Code provides two methods for the enforcement of the liabilities of stock-

122 Hennessey v. Alleghany Min. Co., 159 Cal. 398, 113 Pac. 1071.

holders to the corporation by reason of assessments levied upon the capital stock—one by a sale of the stock in pursuance of the plan devised in the statute; the other by an action of law, at the option of the directors,"[123] and this action may be taken to collect even a subscription to a preliminary agreement to form the corporation, the corporation being largely indebted, and the directors having levied an assessment to pay the same.

As to loss of jurisdiction to sell shares, and therefore to elect to sue the stockholder, see preceding sections and comments.[124] And an order for the collection of an assessment by suit can not be made before the assessment is delinquent, nor can such an order be made at a special meeting of the directors where all are not present, when it was business which could not have been done at the original meeting.[125]

Where all the directors were not present at a special meeting at which this waiver and election were made, but notices were sent to each by mail, in the absence of further evidence, it will be presumed that the notices thus sent were received and that the notice was sufficient, and therefore the board was authorized to take this action,[126] and this, also, when the by-laws make no provision that such notices may be sent by mail.

123 San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70-78, 35 Pac. 349. The following cases were personal suits against the stockholder, although this section was not referred to, Santa Cruz R. Co. v. Spreckles, 65 Cal. 193-203, 3 Pac. 661, 802; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

124 Civil Code, sections 334, 337, 399, and cases cited.

125 Bank of National City v. Johnston, 133 Cal. 185-189, 65 Pac. 383, by a divided court.

126 Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1-9, 10, 41 Pac. 809; Granger v. Original Empire Mill etc. Co., 59 Cal. 678.

The doctrine announced in an early case, by a court of concurrent jurisdiction (In re South Mountain Consol. Mining Co., 5 Fed. 403, 7 Sawy. 301), that mining corporations were *sui generis,* and were different from commercial corporations having a subscribed capital stock,[127] and that stockholders were not liable to assessment for the debts of a corporation beyond their unpaid subscriptions, has been criticized, doubted, and practically overthrown by decisions of our supreme court.[128]

These proceedings being strictly construed, the complaint must allege all the facts necessary to show a valid assessment and the liability of the stockholder personally.[129] The right to sue the stockholder personally exists solely by virtue of these sections of the Civil Code and they must be strictly pursued.[130]

Where a mining company becomes insolvent, the assignee in insolvency may sue the stockholders for the amount unpaid on their subscriptions, as upon contract, and an attachment may issue against the property of non-residents, and it is not a necessary condition of recovery that the directors should have first levied assessments upon the stock under the provisions of the code as to such unpaid subscriptions,[131] but it may also

127 In re South Mountain Consol. Mining Co., 5 Fed. 403, 7 Sawy. 30, and 14 Fed. 347, 8 Sawy. 366.

128 Harmon v. Page, 62 Cal. 448-459; San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 78, 35 Pac. 349; R. H. Herron Co. v. Shaw, 165 Cal. 668, 675, Ann. Cas. 1915A, 1261, 133 Pac. 488.

129 San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542; Shively v. Eureka etc. Min. Co., 129 Cal. 293, 61 Pac. 939.

130 National Parafine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506.

131 Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Tulare Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

be collected by assessments under the statutory provisions.[132]

So a judgment creditor of a corporation may sue his garnishee-stockholder, directly, to recover the amount of an assessment made by the corporation on the full paid stock of the stockholder, the corporation having waived a sale of the stock and elected to proceed against the stockholder personally;[133] the stockholder's liability in such a case arises upon an implied contract, and hence comes within the provisions of the statutes concerning garnishment. The same rule applies to attachment in a suit by a creditor to recover the amount unpaid upon a subscription.[134]

A resolution of the directors authorizing the officers to commence suit for the collection of the assessment is a waiver of the further proceeding to sell the stock therefor, provided in the foregoing sections.[135]

132 Union Savings Bank v. Leiter, 145 Cal. 696, 700, 79 Pac. 441.

133 Marshall v. Wentz, 28 Cal. App. —, 153 Pac. 244.

134 Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

135 San Gabriel Valley Land etc. Co. v. Dennis, 4 Cal. Unrep. 272, 34 Pac. 441.

CHAPTER XX

CORPORATION RECORDS TO BE KEPT

Section 377 of the Civil Code is as follows:

> § 377. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and, if special, its object, how authorized, and the notice thereof given.
>
> The record must embrace every act done or ordered to be done; who were present, and who absent; and, if requested by any director, member, or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom.
>
> On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made.
>
> On similar request, the protest of any director, member, or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation. (Enacted March 21, 1872.)

TRANSACTIONS MAY BE PROVED BY PAROL

A treasurer paid out money without previous authority, but afterwards the directors ratified his act by resolution. It was held that if the secretary by mistake or oversight failed to enter the resolution of record, or if for any reason the formal entry in the record had been postponed by the president and directors, the passage of the resolution may be proved by parol.[1]

The rough memoranda of its proceedings, made during the progress of a meeting, are not original evidence

1 Bay View etc. Ass'n v. Williams, 50 Cal. 353-357.

of what transpired at the meeting, but secondary only; the duly authenticated record in the books of the corporation are the best evidence, and, in the absence of such a record, testimony of witnesses may be heard to prove what transpired.[2]

The mere fact that the resolution authorizing the execution of a mortgage does not appear on the books of the corporation does not sufficiently disprove that such a resolution was duly passed, when the mortgage is executed by the proper officers and is under seal.[3]

In another case it was said: "It is likewise immaterial that the minutes failed to disclose the action of the board taken in regard to certain matters. At most, the minutes of the proceedings of the board of directors are *prima facie* evidence only of its acts. In the absence of minute entry of its proceedings, they may be proved by parol evidence."[4] Also that "no duty devolves on the purchaser of stock [from the corporation] to see that not only his name, but the names of all other purchasers . . . are entered on the corporate books. . . . To hold that a creditor of a corporation can not recover from the owner of the stock upon a statutory liability because the corporation has neglected to make the proper book entries of his holdings, showing him to be a stockholder, would nullify the provisions of both the constitution and statute."

But strong and most convincing evidence should be required, we think—usually corroborating circumstances, as existed in most of these cases. In a case shortly after the first case decided, without citing it and

2 Boggs v. Lakeport etc. Ass'n, 111 Cal. 354, 43 Pac. 1106.

3 Schallard v. Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590. As to an assignment of account, McKee v. Cunningham, 2 Cal. App. 684-687, 84 Pac. 260.

4 Hughes Mfg. etc. Co. v. Wilcox, 13 Cal. App. 22, 29, 108 Pac. 871.

by a divided court, a judgment, founded upon oral testimony to the effect that the record did not express correctly the proposition voted on by the board, was affirmed without comment or discussion.[5]

The record of the secretary of an annual meeting of stockholders is *prima facie* evidence of what was done at the meeting, and of who were present or absent, but oral testimony may be introduced to contradict its contents; moreover, his statement to the meeting, recited in the minutes, that those present constituted or did not constitute two-thirds of the stockholders, is not even *prima facie* evidence of that fact. The "stock and transfer book," in connection with the names of the parties present, conclusively determines that fact.[6] It was further said in this case that, in the absence of evidence from the "stock books," the stockholder's testimony as to the number of shares owned by him at that time must prevail over the unsupported recital of the secretary in his minutes of the meeting.

RIGHT TO INSPECT

A stockholder (and a creditor) has the absolute right, without limitations or conditions, and without regard to his motives, to inspect during office hours all the records of the corporation; and this right will be, if necessary, enforced by *mandamus*. The common law rule that *mandamus* would not issue to gratify mere idle curiosity, but that some specific interest at stake or some beneficial purpose must be shown, is abrogated by

[5] Gilson Quartz M. Co. v. Gilson, 51 Cal. 341. And also a resolution authorizing the secretary to borrow money, which was not entered in the minutes, nevertheless is valid, Bank of Yolo v. Weaver, 3 Cal. Unrep. 569, 31 Pac. 160.

[6] Middleton v. Arastraville M. Co., 146 Cal. 219, 79 Pac. 889.

the unconditional right given by the statute,[7] and it is the duty of the secretary, or other custodian of the records, to allow the inspection upon demand.

And this rule applies even to a list of stockholders with their addresses, prepared by the secretary on the order of and for the convenience of the directors, although such a list be not one specifically required by law to be made—being so made it is part of the record of the acts done or ordered to be done by the directors.[8]

But creditors of stockholders do not have any right of inspection of the books of the corporation.[9]

If a corporation seeks to exclude a member from inspecting and taking copies of its records, etc., on the ground that it is a benevolent corporation (under the exceptions mentioned in article 12, section 14, of the constitution) it must allege and prove that fact.[10]

The refusal to allow an inspection of vouchers, obligations and financial affairs of a corporation which is doing a losing business and approaching insolvency, is not a ground, along with these, for dissolving the corporation.[11]

But if any officer refuses permission to any stockholder to inspect and take copies during office hours of

7 Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050. See, also, constitution, article 12, section 14. As to right to require books, etc., to be produced in court, see Ex parte Clarke, 126 Cal. 235, 238, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546. For a discussion, generally, of the right to compel the production of a corporation's books and papers, see Kullman etc. Co. v. Superior Court, 15 Cal. App. 276, 282, et seq., 114 Pac. 589.

8 Poor v. Yarnell, 28 Cal. App. —, 153 Pac. 976.

9 National Bank etc. v. Western Pacific Ry. Co., 157 Cal. 573-581, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

10 Gavin v. Pacific Coast etc. Co., 2 Cal. App. 638, 84 Pac. 270.

11 Burham v. San Francisco Fuse Co., 76 Cal. 24, 17 Pac. 940.

any book, paper, or document belonging to the corporation, he is guilty of a misdemeanor. Section 565 of the Penal Code and section 321 of the Civil Code are as follows:

> **§ 565.** Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor. (Enacted February 14, 1872.)
>
> **§ 321.** Every corporation doing a banking business in this state must keep in its office, in a place accessible to the stockholders, depositors, and creditors thereof, and for their use, a book containing a list of all stockholders in such corporation, and the number of shares of stock held by each; and every such corporation must keep posted in its office, in a conspicuous place, accessible to the public generally, a notice, signed by the president or secretary, showing:
>
> First—The names of the directors of such corporation;
>
> Second—The number and value of shares of stock held by each director.
>
> The entries on such book and such notice shall be made and posted within twenty-four hours after any transfer of stock, and shall be conclusive evidence against each director and stockholder of the number of shares of stock held by each. The provisions of this section shall apply to all banking corporations formed or existing before twelve o'clock noon of the day on which this code took effect, as well as to those formed after such time. (Enacted January 29, 1876; amendts. 1875-6, p. 72.)

ARE EVIDENCE

In a suit in *quo warranto* to dissolve a corporation because it did not commence business within one year from the date of the filing of its Articles of Incorporation, the minute book, by-laws, etc., showing adoption of resolutions, etc., tend to show that it had commenced business.[12]

Between parties, not connected with a corporation, concerning property upon which the corporation had a chattel mortgage, it was held that the books of the corporation were competent evidence to show receipts of the corporation for the property. The court said they were records of the business of the corporation required by law to be kept, and constituted the "memory" of the transactions of the corporation, and, being identified, were competent evidence.[13] The only authority cited is a case in which the corporation was a party—a case hardly in point.

FALSIFYING RECORDS

Falsifying records, with intent to defraud, is a felony. See section 563 of the Penal Code.

STOCK AND TRANSFER BOOK AND OTHER RECORDS

Section 378 of the Civil Code is as follows:

> § 378. In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "stock and transfer book," in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale, or transfer of stock made, the date thereof,

12 People v. Rosenstein etc. Co., 131 Cal. 153, 63 Pac. 163.

13 Hurwitz v. Gross, 5 Cal. App. 614-621, 91 Pac. 109.

and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary.

Such stock and transfer book must be kept open to the inspection of any stockholder, member, or creditor. (Enacted March 21, 1872.)

The stock books should contain no entries except those required by the law to be made. Any further statement in regard to the ownership of the stock has no place on the books, and such entries are properly excluded as evidence.[14]

Where the only books partaking in any way of this character, kept by a corporation, were the certificate stub book and a stock ledger and stock journal, the secretary testifying that they contained the names of all the stockholders and that no other persons appeared on the books of the company as owning any stock, the court said, "The book introduced seems to have been designed for the stock and transfer book. . . . So far as its contents are set out, it corresponds with what is required by the code. The fact that the book is not named as the code requires is not material." There was no stock subscription book. It was held that these books, together with this testimony, were sufficient to establish who were the stockholders (really subscribers), and that the code does not require that there shall be a subscription book, nor direct how subscriptions shall be made.[15]

But the stock certificate stub book is not sufficient to show who the subscribers are, for it contains no record of those to whom certificates have not yet been

[14] Fletcher v. Kidder, 163 Cal. 769, 770, 127 Pac. 73. See Attachment and Sale and Pledge of Stock.

[15] Knowles v. Sandercock, 107 Cal. 629-636, 40 Pac. 1047; Evans v. Bailey, 66 Cal. 113, 4 Pac. 1089.

issued;[16] in this case the Articles of Incorporation showed others who were subscribers.

The "stock and transfer book" is not a public record accessible to all persons, nor does this book hold any person out to the world as the owner of any stock, since the world can not have access to it. Stockholders and creditors may inspect it, but no other persons.[17]

This record, on questions of the right to vote, is conclusive as to the amount of stock owned by a stockholder, but, in the absence of such a book, the stockholder may testify as to the number of shares owned by him, even if in so doing he contradicts the record or minutes of an annual meeting.[18]

LOST RECORDS, RESTORING

Section 365 of the Civil Code provides proceedings for restoring all manner of corporation records and papers "lost or destroyed by conflagration or other public calamity."

Why this relief should be so limited is not apparent. Conflagration, as distinguished from fire, is defined by lexicographers as the burning of a large mass, as a city or a forest; this statute emphasizes this meaning by defining the loss or conflagration as a public calamity by the following words, "or other public calamity."

Some relief ought to be afforded in case of destruction in any manner, also in case of theft, or of simple loss, however it occurs.

The method provided in this section is very laborious, tedious and complicated. It should be simplified and made applicable to loss in any manner. It is too long to quote in full.

[16] Pacific Fruit Co. v. Coon, 107 Cal. 447-453, 40 Pac. 542.

[17] National Bank etc. v. Western Pacific Ry. Co., 157 Cal. 573-581, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

[18] Middleton v. Arastraville M. Co., 146 Cal. 219, 79 Pac. 889.

CHAPTER XXI

EXAMINATION OF CORPORATIONS

Section 382 of the Civil Code is as follows:

§ 382. The attorney general or district attorney, whenever and as often as required by the governor, must examine into the affairs and condition of any corporation in this state, and report such examination, in writing, together with a detailed statement of facts, to the governor, who must lay the same before the legislature; and for that purpose the attorney general or district attorney may administer all necessary oaths to the directors and officers of any corporation, and may examine them on oath in relation to the affairs and condition thereof, and may examine the books, papers, and documents belonging to such corporation, or appertaining to its affairs and condition. (Enacted March 21, 1872.)

POWER OF ATTORNEY GENERAL

Neither the attorney general nor a district attorney is empowered by this section, upon his own initiative, to make examinations of corporations.[1] But he is not dependent upon the consent or requirement of any other person in bringing suits against a corporation for the unlawful exercise of a franchise.[2]

EXAMINATION BY LEGISLATURE

Section 383 of the Civil Code is as follows:

§ 383. The legislature, or either branch thereof, may examine into the affairs and condition of any corpora-

1 People v. Hibernia Sav. etc. Soc., 72 Cal. 21-23, 13 Pac. 48.

2 Section 803, Code of Civil Procedure.

> tion in this state at all times; and, for that purpose, any committee appointed by the legislature, or either branch thereof, may administer all necessary oaths to the directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers, and documents, by summary process, to be issued on application to any court of record or any judge thereof, under such rules and regulations as the court may prescribe. (Enacted March 21, 1872.)

The power of the legislature, however, or of either branch thereof, is original, and is very extensive under the provisions of this section. This power is somewhat analogous to the ancient visitorial powers, exercised first by donors to eleemosynary and ecclesiastical institutions, and later by the king, through the court of king's bench, over civil corporations. But it has no power, as did the visitors, to order the corporation to do anything; this law is simply to enable the legislature to ascertain the facts upon which officers of the state may proceed in the courts to secure proper orders or judgments. It is made use of in the case of banks, insurance companies, railroads and other semi-public corporations. No case has appeared yet in our court reports where this power has been exercised over strictly private corporations, but the power to do so can not be questioned. The power to act upon such information would certainly be confined, in case of purely private business corporations, to prohibiting them continuing an act in violation of their franchises or powers, or actions to forfeit their franchises, or to compel an officer by *mandamus* to perform any act or duty enjoined by law, or to exercise a discretion—not to control the discretion, nor to compel performance of

obligations resting upon contract, nor indeed any duties or obligations not created by the by-laws or by the statute.

The power of the legislature to make such investigations of a loan and trust company and a building and loan association was sustained to its fullest extent in a criminal case where, naturally, the law would be more strictly and narrowly construed than in ordinary civil cases.[3]

[3] In re Application of Bunkers, 1 Cal. App. 61, 81 Pac. 748.

CHAPTER XXII

FORFEITURE OF FRANCHISES—DISSOLUTION, INVOLUNTARY

Section 803 of the Code of Civil Procedure is as follows:

> § 803. An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor. (Amended March 19, 1907; stats. 1907, p. 600.)

TWO CLASSES OF VIOLATION OF LAW

It was said that cases of forfeiture are divided into two classes: "1. Cases of perversion; as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases, unless the perversion is such as to amount to an injury to the public who are interested in the franchise, it will not work a forfeiture. 2. Cases of usurpation; as where a corporation exercises a power which it has no right to exercise. In the last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public."[1]

[1] People v. Dashaway Ass'n, 84 Cal. 114, 119, 12 L. R. A. 117, 24 Pac. 277; cited with approval in People v. Rosenstein etc. Co., 121 Cal. 153, 63 Pac. 163.

The power of the corporation to dispose of its property honestly and in good faith is not affected by the pendency of proceedings to forfeit its charter, nor is the property of a corporation forfeited on the forfeiture of its charter,[2] and the forfeiture of other franchises does not operate to forfeit the franchise to exist.[3]

ATTORNEY GENERAL'S POWERS AND DUTIES

Assuming, but not deciding, that the discretion of the attorney general is not entirely beyond the control of the court, the court said that it can not compel him to violate his judgment by ordering him to bring suit on the complaint of a private party, unless the abuse of discretion on his part is extreme and clearly indefensible; where such an extreme case is not presented a decree of a court, compelling him to act against his judgment, is erroneous, and itself an abuse of discretion.[4]

Though a suit be brought by the attorney general on the complaint or relation of a private person, the attorney general maintains sole control over the suit; the complaint stating that the suit is so brought on the relation of a party named does not convert the proceeding into a private action,[5] and such a suit may be brought by a proceeding strictly in form of a *quo warranto* or by a regular action; there is now practically no difference in the proceedings, *quo warranto* being quite as broad as the action provided for under these sections of the code.

2 Havemeyer v. Superior Court, 84 Cal. 327, 379, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

3 Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

4 Lamb v. Webb, 151 Cal. 451-454, 91 Pac. 646.

5 People v. Sutter St. Ry. Co., 117 Cal. 604-612, 49 Pac. 736; People v. Dashaway Ass'n, 84 Cal. 114-120, 12 L. R. A. 117, 24 Pac. 277.

But a judgment excluding a corporation from usurping franchises, independent of its franchise to exist, does not affect its franchise to exist or dissolve the corporation;[6] nor does the assessment of a fine against the corporation in such a proceeding authorize the court to appoint a receiver, although the complaint alleged that the assets of the corporation were in danger of being squandered.

PROCEEDINGS BOTH CIVIL AND CRIMINAL IN THEIR NATURE

This proceeding takes the form of a civil action, and the procedure follows the rules for civil cases, and the judgment of ouster and seizure is of that nature; but the fine which may be imposed under section 809 of the Code of Civil Procedure is penal in its nature, for it is not imposed to compensate the state, but as a punishment.[7]

An appeal lies from a judgment in this kind of a case,[8] but in case of a person usurping a public office giving an appeal bond does not have the effect of staying proceedings (Section 949, Code of Civil Procedure). A director of a corporation, however, does not hold a public office.[9]

It is not necessary that there should exist a *de jure*

[6] Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

[7] People v. Sutter St. Ry., 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104; that it is quasi criminal in its nature, by a divided court, People v. Superior Court, 114 Cal. 466-470, 46 Pac. 383. As against an officer the judgment is of ouster; as against a corporation, of ouster and seizure (of the franchise), People v. Dashaway etc. Co., 84 Cal. 114-119, 12 L. R. A. 117, 24 Pac. 277.

[8] People v. Oakland, 123 Cal. 145, 55 Pac. 772; State etc. Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

[9] Foster v. Superior Court, 115 Cal. 279-283, 47 Pac. 58.

office, or corporation; the act is an usurpation of a power of government.[10]

It was also intimated in a case[11] that a city could not bring the suit (to forfeit the right of the use of certain streets for a street railway), and therefore it could not waive the forfeiture, that the city could not be estopped in respect to a matter over which it has no power.

In *quo warranto* proceedings the state may allege in general terms that the corporation has usurped a franchise, describing it, and thus throw the burden upon the defendant of setting up and proving its right thereto; but if the complaint alleges specific grounds and facts they must be sufficient to sustain the charge of usurpation, and, if denied, the burden of proof is on the state.[12]

Acts sufficient to cause a forfeiture do not *per se* produce a forfeiture. The corporation continues to exist until the sovereignty which created it procures an adjudication of forfeiture,[13] but this rule is subject

10 Ex parte Henshaw, 73 Cal. 486-493, 15 Pac. 110, and this section amended as it now stands. The legal existence of a de facto corporation can be raised only by the state in quo warranto proceedings, Keech v. Joplin, 157 Cal. 1, 106 Pac. 222; Reclamation Dist. v. McPhee, 13 Cal. App. 382, 109 Pac. 1106; Barnes v. Board of Supervisors, 13 Cal. App. 760, 766, 110 Pac. 820; Jaques v. Board of Supervisors of Yuba County, 24 Cal. App. 385, 141 Pac. 404.

11 People v. Sutter St. Ry. Co., 117 Cal. 604, 49 Pac. 736.

12 People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. There is no presumption against the state that citizens are exercising a franchise rightfully; the defendant in quo warranto must show its right, People v. Stanford, 77 Cal. 360-377, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; People v. Volcano etc. Co., 100 Cal. 87, 34 Pac. 522; People v. Lowden, 2 Cal. Unrep. 537, 8 Pac. 66.

13 People v. Los Angeles etc. Co., 91 Cal. 338-340, 27 Pac. 673.

to statutes which declare that the franchises cease to exist on the happening of some event.[14]

FOR VIOLATION OF FRANCHISE

One other method may be resorted to for the purpose of dissolving a corporation, and only one other—a suit by the attorney-general to dissolve a corporation for a violation of its charter or the law. No individual can institute a suit for that purpose, although, in certain cases, he may be the relator in the suit of the attorney-general.

It was vainly sought to oust a corporation of its franchises because it habitually omitted a part of its name ("of Placer County, California") in its business transactions,[15] or that its business was impractical,[16] or that it was carrying on a losing business and refused to allow stockholders to inspect its books,[17] or that it levied an illegal assessment,[18] or owned real property not essential, or, prior to the amendment to Civil Code, section 358, it had sold all of its property,[19] or that it held land, which it had no right to hold, for more than five years;[20] nor will a public corporation be dissolved for misconduct of its officers,[21] but a contrary rule obtains in the case of private corporations, unless it can be shown that the acts of the officers were in viola-

14 Arcata v. Arcata etc. Co., 92 Cal. 639-646, 28 Pac. 676; Kaiser Land etc. Co. v. Curry, 155 Cal. 638, 103 Pac. 341; Lewis v. Curry, 156 Cal. 93, 103 Pac. 493.

15 People v. Bogart, 45 Cal. 73, 12 Morr. Min. Rep. 572.

16 People v. Reclamation District, 53 Cal. 346.

17 Burham v. San Francisco etc. Co., 76 Cal. 24, 25, 17 Pac. 940.

18 People v. Rosenstein etc. Co., 131 Cal. 153, 63 Pac. 163.

19 Sullivan v. Triunfo etc. Co., 39 Cal. 459.

20 People v. Stockton etc. Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078.

21 People v. Reclamation District, 53 Cal. 346.

tion of duties imposed or instructions given by the corporation.[22]

The principle upon which forfeiture proceedings are based is that a franchise is a trust, and the terms of the charter are conditions of the trust, and that these conditions have been violated; but such matters must be more than trivial—they must amount to the usurpation of power or a perversion inconsistent with the nature of the grant amounting to injury to the public, or failure to perform the duties for which it was organized.[22] This was said in the case of a temperance organization, with no capital stock, consisting of a large membership, and receiving donations from the public. While in a sense the above principles would apply to all corporations, they are not so rightly applied in the case of private business corporations.

But the acts of a lessee of a corporation, for which acts it is, in the nature of things, responsible, such as performing its duty to the public, may have the effect of forfeiting the charter of the lessor corporation,[23] and where the corporation was formed for the purpose of exercising the power of eminent domain for improper purposes, its franchises will be declared forfeited in a proper proceeding for that purpose.[24]

FAILURE TO ORGANIZE OR TO CONTINUE BUSINESS

See Civil Code, section 358, and comments, ante.

Where the directors named in the Articles for the first year never met or acted, but refused to do so, no

[22] People v. Dashaway Ass'n, 84 Cal. 117, 12 L. R. A. 117, 24 Pac. 277; People v. San Francisco Stock Exch., 4 Cal. Unrep. 85, 33 Pac. 785.

[23] Lee v. Southern Pacific R. R., 116 Cal. 97, 58 Am. St. Rep. 140, 38 L. R. A. 71, 47 Pac. 932.

[24] People v. Pittsburgh etc. Co., 53 Cal. 695, 12 Morr. Min. Rep. 518.

stock was ever issued, no officers were elected, no meeting of stockholders was ever held, and no journal or record was ever kept, the parties concerned never became even a *de facto* corporation.[25] This case was not, however, one brought to oust the corporation from its franchise to exist, but to recover upon alleged obligations.

In a direct proceeding to oust a corporation from its franchises, to declare its charter forfeited, on the ground that it did not commence business within one year after the date of its incorporation, as required by section 358 of the Civil Code, it was held that the minute book containing the record of its resolutions and meetings and showing the nature of the business transacted is competent evidence as tending to show the organization of the corporation and the doing of business.[26]

The clause of section 358 of the Civil Code providing that if, after its organization and commencement of business, the corporation shall lose or dispose of all its property, or fail for the period of two years to elect officers and transact business in the regular order, its corporate powers shall cease, and that it may be dissolved at the instance of a creditor in a suit by the state brought by the attorney-general, was added in 1901, as was also the final proviso that even the state could not raise this question where the company, claiming in good faith to be a corporation, had been doing business for ten consecutive years.

[25] Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

[26] People v. Rosenstein etc. Co., 131 Cal. 153, 63 Pac. 163. See, also, People v. Los Angeles etc. Co., 91 Cal. 338-340, 27 Pac. 673, to the effect that acts sufficient to cause a forfeiture do not per se produce a forfeiture.

Before the adoption of this amendment, a case arose,[27] not in *quo warranto* to declare the charter forfeited, but to quiet title to some of the corporation's property, in which it was claimed that the corporation had forfeited its charter by non-user, the court saying that "a corporation once formed and organized according to law does not become dissolved or cease to exist merely because of failure to transact business. Its term of life is prescribed by law, and only at the instance of the state can its existence in the meantime be questioned. This rule applies also in case of a *de facto* corporation."

In a case arising after this amendment was passed, in a collateral attack on the corporation's existence, it was held that, while defending a suit to foreclose a mortgage on all of its property, it can not be said that it was failing to transact its business in regular order, and that it still had a corporate existence until the state, through the attorney-general, took the proper proceedings to effect the forfeiture, which had not been done in that case. It was also held that, as the corporation had been doing business in good faith for ten years before the passage of the amendment, the state was precluded from bringing such a suit.[28]

It was not necessary, in this case, to determine whether the phrase "has been doing business for ten consecutive years" would include years only before the passage of the amendment, but we do not believe this would be a reasonable construction of this language; if such had been the intention it would not be clearly expressed without adding words equivalent to "at the time of the passage of this act." The perfect tense in grammar, like "has run," and "has executed," refers almost universally to the time the rights

[27] San Diego Gas Co. v. Frame, 137 Cal. 441, 445, 70 Pac. 295.

[28] Robinson v. Blood, 151 Cal. 504, 507, 91 Pac. 258.

arose, or the duty was enjoined, or the beginning of the suit, and not to the time of the passage of the statute.

While it has been said in some kinds of cases that a positive declaration of forfeiture made by a statute does not require a suit by the state to accomplish that result,[29] yet the real meaning of the above section of the code is not to declare a forfeiture *eo instanti* but to declare it upon the institution and judgment of such a suit.

Equity has no power to dissolve a corporation; such power, if it exists, arises by virtue of statutory authority, and the power of the courts does not go beyond the express provisions of the statute, either as to the conditions under which it may be invoked, or the extent of the judgment which may be rendered.[30]

NO RECEIVER APPOINTED

See this subject under Code of Civil Procedure, sections 531, 564, and 565, post.

WHO DEFENDANTS

If the suit is to annul franchises granted to a corporation, or to prevent it usurping franchises not belonging to it, the corporation is the only proper defendant; if it is to prevent the exercise or usurpation of a franchise to exist, the proceeding must be against the persons acting as such pretended corporation.[31]

29 Oakland R. Co. v. Oakland etc. Co., 45 Cal. 365, 13 Am. Rep. 181; Kaiser Land etc. Co. v. Curry, 155 Cal. 638, 649, 103 Pac. 341, and cases cited.

30 Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508, 1 Morr. Min. Rep. 80; French Bank Case, 53 Cal. 495, 551; State Investment Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

31 People v. Stanford, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; People v. Reclamation District, 117 Cal. 114, 117, 48 Pac. 1016; People v. Dashaway Ass'n, 84 Cal. 114, 144, 12 L. R. A. 117, 24 Pac. 277.

But it was said an action for the usurpation of a municipal franchise may be brought against the defendant in its assumed corporate name without joining the trustees.[32] It was said in effect that the liability of the trustees is for usurpation of office and not of a franchise, but, as we have seen, this proceeding can not be resorted to to try the title to the office of director of a corporation, because the latter is not a public office. It seems to us that the difficulty is more easily solved by considering the organization (for it is an organization) as a *de facto* corporation, the officers of the organization, the pretended corporation, being the agents, the representatives of all persons interested. In proceedings against a *de facto* corporation to deprive it of its charter, the corporation is a necessary defendant,[33] and in proceedings to test the validity of a municipal corporation the municipality, real or pretended, must be a defendant.[34] If bondholders of an irrigation district are permitted to intervene in a suit by the state in *quo warranto* proceedings charging the district with usurping the powers of such a district and to have its powers and franchises declared forfeited, they may defend to the same extent as the district could.[35]

ORGANIZATION, SUBSTANTIAL COMPLIANCE WITH LAW NECESSARY

In a proceeding by the state to oust the defendants from exercising the franchise of being a corporation, an instance of failure of a substantial compliance with the law concerning its organization was where the requisite number of persons required by law did not

[32] People v. Riverside, 66 Cal. 288, 5 Pac. 350.

[33] People v. Montecito etc. Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; People v. Flint, 64 Cal. 49, 28 Pac. 495.

[34] People v. Gunn, 85 Cal. 238, 24 Pac. 718.

[35] People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399, 773.

sign the Articles of Incorporation.[36] Other instances have not come before the courts, but can be readily discerned.

TAKING TOO EXTENSIVE POWERS IN ARTICLES

Where a corporation was formed for the purpose of manufacturing lumber, and the Articles also contained the taking of power "to buy, lease, sell, mortgage, and otherwise deal in . . . railroads, tramways, etc.," it was held that the Articles did not authorize the corporation to buy, lease, or operate a railway for traffic nor give it the right of eminent domain to acquire rights of way, but, subject to these limitations, as such appliances are frequently necessary for such corporations, that *quo warranto* will not lie to oust it from exercising such rights.[37]

STATUTE OF LIMITATIONS

The statute of limitations (Code of Civil Procedure, section 345) may be pleaded in some possible cases of misuse or non-use of powers, but not as to the franchise to be a corporation if the usurpation continues, for the continuous use is a renewed usurpation each day.[38]

[36] People v. Golden Gate Lodge, 128 Cal. 257, 60 Pac. 865; People v. Montecito etc. Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; Wall v. Mines, 130 Cal. 27, 40, 62 Pac. 386.

[37] People v. Mount Shasta etc. Co., 107 Cal. 256, 40 Pac. 391.

[38] People v. Stanford, 77 Cal. 360-377, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

CHAPTER XXIII

VOLUNTARY DISSOLUTION

A voluntary dissolution of a corporation can not be accomplished by the concurrent action of the stockholders and directors, as it may be in many states; that power is lodged in the superior court.

The proceeding is cumbersome, tedious, and expensive, especially to small corporations which comprise the great majority of those desiring to voluntarily dissolve. And, under the decisions, the court proceedings afford no additional protection of substantial value to creditors.

The statutes on this subject are contained in sections 1227 to 1234 of the Code of Civil Procedure, copy of which is as follows:

> **§ 1227.** A corporation may be dissolved by the superior court of the county where its principal place of business is situated, upon its voluntary application for that purpose. (Amended April 16, 1880; amendts. 1880, p. 109.)
>
> **§ 1228.** The application must be in writing, and must set forth:
>
> 1. That at a meeting of the stockholders or members, called for that purpose, the dissolution of the corporation was resolved upon by a vote of two thirds of the members or of the holders of two thirds of the subscribed capital stock;
>
> 2. That all claims and demands against the corporation have been satisfied and discharged. (Amended March 16, 1907; stats. 1907, p. 318.)
>
> **§ 1229.** The application must be signed by a majority of the board of trustees, directors, or other officers

having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action. (Enacted March 11, 1872.)

§ 1230. Upon the filing of the application, the clerk must give notice of the same for such time as the court may order, but not less than thirty nor more than fifty days, by publication in some newspaper published in the county; or if there be no newspaper published therein, then by notices posted in three of the principal public places in the county. (Amended March 16, 1907; stats. 1907, p. 318.)

§ 1231. At any time before the expiration of the time of publication, any person may file his objections to the application. (Enacted March 11, 1872.)

§ 1232. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, must declare the corporation dissolved. A certified copy of the decree and order of the court dissolving the corporation must be filed in the office of the secretary of state. (Amended March 20, 1907; stats. 1907, p. 744.)

§ 1233. The application, notices and proof of publication, objections (if there be any), and declaration of dissolution, constitute the judgment roll; and from the judgment an appeal may be taken, as from other judgments of the superior courts. (Amended April 16, 1880; amendts. 1880, p. 109.)

§ 1234. If the applicant is a savings and loan association, or engaged in the business of receiving money on deposit, and there is any unclaimed deposit or dividend in its hands belonging to a person whose whereabouts are unknown to the trustees, directors, or other officers presenting the application, the application must set forth the name of the person making such deposit, or entitled to such dividend, the time when such deposit

was made or dividend declared, the residence, if known, of such person at the time of such deposit, the amount of such deposit or dividend, and the fact that the whereabouts of such person are unknown. The same facts must be stated in the notice of the application given by the clerk. If, at any time before the expiration of the time of publication, any person files a claim to such deposit or dividend, the court must, at the hearing and upon five days' notice to him, hear and determine his claim, and, if such claim is established, order such money to be paid to him. All such deposits or dividends not so claimed, or as to which no claim shall be established, must, upon order of the court, be paid into the state treasury, accompanied by a copy of the order, which must set forth the facts hereinbefore required to be stated concerning such deposits or dividends; and, upon production of the treasurer's receipt for such payment, the court may proceed to declare the corporation dissolved, as in other cases. All unclaimed deposits and dividends so paid into the state treasury must be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates, and in section twelve hundred and seventy-two. (Amended March 16, 1907; stats. 1907, p. 318.)

If any debts of the corporation exist, even if contingent, there can be no voluntary dissolution of the corporation, and the burden of proof that there are no debts is upon the corporation.[1]

Where the provisions of the foregoing sections have been properly followed, the validity of a judgment dissolving a corporation can not be collaterally attacked on the ground that the statement in the complaint that all claims and demands against the corporation had been satisfied and discharged is false;[2] but

1 In re Balfour & Gurrette, 14 Cal. App. 261, 111 Pac. 615.

2 Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335.

doubtless its validity could be raised in a direct attack on the ground that the false statement was a fraud upon the court and all creditors. It was further decided, in the case cited, that these sections of the code are not unconstitutional on the ground that the only notice of the application for the dissolution required to be given is by publication; the debts of a corporation are not vacated by its dissolution—equity treats the surviving assets as a trust fund for the creditors and stockholders. Also, it was decided that, where there is no statutory provision for the continuation of a corporation for the settlement of its affairs (as there is none in this state), provision is made for settling these affairs in some other manner, and that this is covered in this state by section 400 of the Civil Code providing that "unless other persons are appointed by the court, the directors or managers of the affairs of the corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation," and that the provisions of this section are applicable in all cases of dissolution, whether voluntary or involuntary. It was further said in this case that the decree of dissolution of the corporation terminates the existence of the corporation, the same as death of a natural person, and that it no longer can sue or be sued, no one can appear or act for it, and all pending actions against it are abated *(dictum)*, and any judgment attempted to be given against it is void. These statements should be limited to cases instituted after the decree of dissolution was rendered, which was the case before the court. What would be the effect upon such a decree if the complaint failed to state that all debts were paid, or the evidence disclosed the contrary to be true, does not appear; probably no other or greater effect than similar errors in other kinds of

cases, although this fact appears to be almost jurisdictional.

Such a void judgment (in a suit begun after the dissolution) may be impeached collaterally by any one interested, such as a creditor or stockholder, and any one interested may appear in such a suit and assert this claim to defeat the action.

A virtual dissolution of the corporation can not be legally made by a distribution of its assets among its stockholders; proceedings must be had under above sections of the code,[3] which are exclusive.

The law existing at the time the stock was issued requiring the resolution for dissolution to be carried by a vote of two-thirds of the stockholders, has no application to proceedings begun after the amendment of 1907, which requires the resolution to be carried by a two-thirds vote of the holders of the subscribed capital stock; the "power to alter or repeal the charter of a corporation becomes a part of the contract of every stockholder of the corporation organized thereunder."[4]

A speedy and effective method was discovered for dissolving, that is, bringing a corporation to an end, and liquidating its obligations, and dividing the remaining assets among the stockholders, by amending the Articles of Incorporation under the provisions of Civil Code, section 362, shortening the period of its existence to a period as brief as a few days. When this period elapsed, the corporation ceased to exist, and the directors, as trustees, settled up its affairs.[5] But

[3] Kohl v. Lilienthal, 81 Cal. 378-386, 6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689.

[4] In the Matter of College Hill etc. Ass'n, 157 Cal. 596, 108 Pac. 681.

[5] Tognazzini v. Jordan, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879.

this simple method was taken away by the amendment of section 382, in 1915.

TRUST COMPANIES

If the corporation to be dissolved is a trust company, the special method established in the Code of Civil Procedure, section 1235, as amended in 1915, is to be followed.

CHAPTER XXIV

RECEIVERSHIP UNDER THE STATUTES

Sections 531, 564, and 565 of the Code of Civil Procedure are as follows:

§ 531. An injunction to suspend the general and ordinary business of a corporation can not be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding. (Amended March 16, 1907; stats. 1907, p. 342.)

§ 564. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. (Enacted March 11, 1872.)

§ 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members. (Amended March 9, 1880; amendts. 1880, p. 4.)

And section 400 of the Civil Code is as follows:

§ 400. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation. (Amended March 21, 1905; stats. 1905, p. 563.)

The courts of this state exhibit a strong disinclination to appoint receivers of corporations. Even in case of insolvent and dissolved corporations the usual practice is to leave the winding up of their affairs to the directors. Sometimes there are advantages by the way of economy in this course.

But as only the state can maintain a proceeding to dissolve a corporation, this reluctance to appoint receivers leaves the management, which has so grossly violated the law and their duties, in complete control

of its affairs, and leaves corporations which are really insolvent to continue in business, and to be administered by the very persons who brought about the insolvency. Corporations which have difficulty in meeting their many obligations are exposed to a cloud of attachments, brought by impatient or frightened creditors, in a race to obtain priorities. This greatly increases litigation and entails heavy expense to all concerned in the way of costs and attorney's fees. Such suits put a stop to the conduct of the affairs of the corporation as effectually as a receivership, while the assets are not so equitably distributed among its creditors, nor do they protect the weak as well as the strong, nor the indulgent creditor as well as the ruthless one; whatever other objects are sought, equal justice is not secured.

The tendency in nearly all the other states in the Union is to enlarge the rule of appointing receivers, rather than to restrict it; and this in furtherance of an equal and equitable distribution of assets to the creditors. Especially is this true of the federal courts; hence, where it is possible, resort is usually had to those tribunals. Indeed, the supreme court of the United States has on more than one occasion recognized the validity of the appointment of a receiver of a railroad company on an *ex parte* hearing on the petition of the railroad company itself;[1] and this not by virtue of any statutory provision, but under the equitable powers of the court.

1 Quincy etc. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; United States Trust Co. v. Wabash etc. R. Co., 150 U. S. 287-300, 37 L. Ed. 1085, 14 Sup. Ct. 86; Wabash etc. R. Co. v. Central Trust Co., 23 Fed. 513; s. c. 22 Fed. 272; Central Trust Co. v. Wabash etc. Ry., 29 Fed. 618; Clarke v. Central Railroad etc. Co. of Georgia, 54 Fed. 556; Cleveland etc. R. Co. v. Knickerbocker T. Co., 64 Fed. 623; Cook on Corporations, sec. 863, p. 2376; Thompson on Corporations, sec. 6356.

EQUITY HAS NO POWER IN THIS STATE TO APPOINT RECEIVERS OF CORPORATIONS

In a case, something over thirty years ago, most elaborately argued, our supreme court said, "there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party,"[2] which was later approved;[3] and this is unquestionably the rule of equity in this state.

The opinion in the French Bank case was written by Wallace, C. J., and the above quoted statement of the law was founded upon the statement immediately following: "This is only to say that there is no jurisdiction vested in these courts in such a case to *dissolve* a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power."[4] In a later case, the court restated the ground upon which the French Bank case was decided, in the following words: "All that was decided in that case was that a court of equity has no jurisdiction, in a suit by a private person against the corporation alone, to appoint a receiver to wind up the business, the practical effect of such a decree being a dissolution of the corporation,

[2] French Bank Case, 53 Cal. 495-550. Also Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; s. c. 87 Cal. 267, 10 L. R. A. 650, 25 Pac. 433; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71, 74, 47 Pac. 872; Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537; Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101, and cases in following notes.

[3] Fischer v. Superior Court, 110 Cal. 129-140, 42 Pac. 561.

[4] This statement, and the rule quoted above, were quoted with approval in Fischer v. Superior Court, 110 Cal. 129, 140, 42 Pac. 561; Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94-101, 89 Pac. 866. The same rule was stated in State etc. Ins. Co. v. Superior Court, 101 Cal. 135, 146, 35 Pac. 549; Murray v. Superior Court, 129 Cal. 628, 632, 62 Pac. 191. See Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

a result which it was held could be accomplished only at the suit of the state. But that an action might be maintained against the directors of a corporation in a proper case was expressly conceded,'"[5] that is, as stated in the former case, for fraud, accident, breach of trust, and the like.

But the scope and effect of the appointment of a receiver was entirely misapprehended in the French Bank case and following cases; neither the object nor effect of the appointment is necessarily to dissolve the corporation, or even to wind it up. Paying its debts may absorb all of its property; often it does not when the expense and destruction of numerous suits and of attachments are avoided. The insolvency which must exist is not such as to make the payment in full of its debts beyond hope in all possible circumstances. Waste and destruction may be caused by precipitous and unrestrained litigation, as well as by the acts of the debtor. Experience has demonstrated that many corporations, by reason of a receivership, have survived—indeed, come out triumphant over—adverse circumstances, with loss to no one, emerging therefrom into a long and prosperous career.

In the French Bank case a creditor sued for the recovery of a debt owing by the bank to him, and also for the amount of his deposit; alleging the insolvency and setting out the facts which made this condition indisputable; also showing that the bank commissioners, after an examination of its affairs, had reported that it was insolvent; alleging that the assets were in imminent danger of being squandered, setting out facts; and alleging that the officers were paying out its funds to creditors in full, notwithstanding its assets were insufficient to pay its debts by the great sum of

[5] People's Home Savings Bank v. Superior Court, 103 Cal. 27-34, 36 Pac. 1015.

eight hundred thousand dollars (as reported by the bank commissioners). If there ever was a case where there ought to have been a receiver that was one, and most of the appointments of receivers, made in the United States for the last quarter of a century, according to the usages of courts of equity independent of statutes, have been made on a state of facts not comparable to this strikingly effective showing.

There are decisions in some other jurisdictions in harmony with the claim that equity has no power to appoint a receiver as announced in the French Bank case, but the overwhelming weight of authority in the United States is opposed to it. Whether that policy be sound, the facts stated as reasons therefor—that is, that an appointment of a receiver "dissolves" the corporation and "winds it up"—are not true.

In later cases[6] it was declared that the consent of the corporation to the appointment of the receiver adds nothing to its validity, for such consent can not confer jurisdiction for that purpose, and, further, that "if the corporation wishes to die it may do so, but only in the way ordained by law," pointing out the sections of the code covering the dissolution of corporations, and that the corporation "can not in this indirect manner destroy itself"—a *non sequitur*, for it is not possible for a mere receivership to destroy a corporation. In one of the cases cited in the last note above, in answer to the contention that the federal courts, from time immemorial, have sustained the authority of courts of equity to appoint receivers of corporations in a proper case, the reply is made that "these authorities are not binding upon the courts of this state, . . . not even . . . the decisions of the supreme court of the United States" except "in cases arising under the constitution

[6] Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322.

or laws of the United States"—quite true in this state, when its courts so declare, but nothing less than that declaration will overcome the formidable reasons to the contrary.

But the French Bank case construed subdivision 5 of section 564, above, otherwise. Before quoting what is said in this case as to this subdivision, it should be borne in mind that it has been decided that neither upon the institution by the state of a suit to dissolve a corporation, nor upon the final judgment of dissolution, does the court have any power to appoint a receiver, for it is said that the state has no interest in either the assets or debts of the corporation, and that the court has no authority to undertake the distribution of the assets and the winding up of its affairs; that Civil Code, section 400, "does not authorize the court to take upon itself the power to settle its affairs, or to appoint a receiver for that purpose;[7] that the administration of the assets of a corporation dissolved, voluntarily or involuntarily, must be made by the directors under section 400 of the Civil Code;[8] and in the State Investment case, at page 148, that "the power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in section 565 of the Code of Civil Procedure." Therefore, there remains only subdivision 5 of section 564 above to be considered to ascertain whether a creditor or stockholder can secure the appointment of a receiver for a corporation for any

7 State etc. Ins. Co. v. Superior Court, 101 Cal. 135-149, 35 Pac. 549; Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555; Havemeyer v. Superior Court, 84 Cal. 327, 361-380, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Code of Civil Procedure, sec. 803.

8 Crossman v. Vivienda Water Co., 150 Cal. 575-580, 89 Pac. 335; Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1040; Lowe v. Superior Court, 165 Cal. 708, 134 Pac. 190; Brandon v. Umpqua, 166 Cal. 322, 136 Pac. 62.

reason. That this may be done would seem to appear too obvious for reasonable doubt. But in the French Bank case the court said (p. 553), "the authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute of this state . . . which undertakes to confer upon a private person, either as a stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver,"[9] and on the statement of facts, detailed *supra*, the court held that the creditor was not entitled to ask for the appointment of a receiver.

But there was an action pending, and it was instituted by one authorized to bring it. It was to recover a debt; and the appointment of a receiver, if made, would be only ancillary; if the prayer was for more it was surplusage. It does not matter whether there is any statute authorizing a private person to maintain an action to dissolve a corporation. If it be claimed that appointing a receiver dissolves a corporation, which it does not, this statute in effect authorizes it. And the concluding clause, quoted above, is directly negatived by this statute. But this case, and the other cases cited, are unreversed, and therefore state the law as it exists in this state.

It is ordinarily quite true, as was said in the French Bank case, that "there is, of course, no such thing as an action brought distinctly for the mere appointment

[9] This extract was quoted with apparent approval in the arguments of the opinions to sustain the decisions in Fischer v. Superior Court, 110 Cal. 129, 141, 42 Pac. 561; Murray v. Superior Court, 129 Cal. 628, 632, 62 Pac. 191, and Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94-101, 89 Pac. 866.

of a receiver; such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation so that the relief awarded by the judgment, if any, may be effective."

Section 564 provides that a receiver may be appointed when "an action is pending" in cases where the corporation "is insolvent or in imminent danger of insolvency." This is in addition to the right declared in the next subdivision that receivers may be appointed in "other cases" where they have been theretofore "appointed by the usages of courts of equity." This section is entirely independent of cases where the corporation has been dissolved; those are provided for in the next section.

Aside from cases brought to dissolve the corporation, who could bring an action against a corporation? No person in the world but a creditor or a stockholder. For what purpose? Only to recover a debt or property or a dividend (which is a debt). For misappropriation or mismanagement the action would be against the officers; to dissolve, the action must be brought by the state. Nor need the creditor's claim be reduced to judgment, for that case is provided for in subdivisions 3 and 4, and the cases provided for in subdivisions 1 and 2 relate to specific property. It would seem that there never was a statute expressed in clearer language; that none is more incapable of several meanings; and that it irresistibly follows that subdivision 5 applies to a case of a creditor of a corporation seeking to enforce payment of the debt owing to him.

NOTICE OF APPLICATION

An injunction suspending the general and ordinary business of a corporation (which could occur only in a suit to dissolve a corporation, or in one in which a

receiver is appointed) can not be granted without due notice of the application to the corporation, except where the state is the plaintiff (section 531, *supra*).

RECEIVERS ON REMOVAL OF DIRECTORS

Where the directors have been removed by the court for fraudulent acts, to the injury of the corporation and to their own benefit, the court may appoint a receiver to take charge of the property of the corporation, if necessary to preserve it. It was said such appointment was not directed toward closing up the affairs of a corporation, nor was it an attempt to dissolve the corporation; and while the appointment was not for the latter purposes, still circumstances might arise which would justify a sale of a part of the property.[10]

OTHER GROUNDS

Among the grounds upon which equity will appoint receivers it was said in cases to hold directors accountable for abuse of their trust;[11] and sometimes to prevent irreparable loss and waste through gross mismanagement; and where there is such dissension in the governing body as to practically prevent the carrying on of the business of the corporation; or where the offices are vacant and the corporation neglects or is unable for any reason to replace them, but not if officers are holding over after the expiration of the term for which they were elected. There are many other reasons which are stated by writers on this sub-

10 California Fruit Growers' Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769, citing Wickersham v. Crittenden, 93 Cal. 17, 32, 28 Pac. 788, to effect that a court of equity could remove directors for fraud (a dictum in that case), which dictum was quoted, by way of argument, in Whitehead v. Sweet, 126 Cal. 67-76, 58 Pac. 376.

11 Dictum in Fischer v. Superior Court, 110 Cal. 129, 140, 42 Pac. 561.

ject. None of them, except those contained in the cases already cited, have come before our appellate courts.

In regard to receivership for specific property, the same rules apply as in case of individuals. Such cases most often arise where property mortgaged by them is insufficient to pay the debt and it is necessary to sequester the income for that purpose during the pendency of the foreclosure proceedings.

MAY BE APPOINTED BY JUDGE AT CHAMBERS

It will be observed that section 564 expressly provides that the appointment may be made either by the court or a judge thereof, while section 565 designates only the superior court as the appointive power, also that section 400 of the Civil Code refers only to the court in that connection.

In a case under the insolvent act which provided that "a receiver may be appointed by the court," the court decided that under this act, taken in connection with the provisions of the Code of Civil Procedure, an appointment of a receiver by the judge at chambers on an *ex parte* application was legal.[12]

INCOME, RENTS, AND GROWING CROPS

If a mortgage of real estate covers also the rents, issues, and profits, if there are no rights of other parties intervening, a receiver may take possession of the growing crops;[13] but if before the receiver takes possession an innocent purchaser buys the crops, such purchaser gets good title;[14] when, however, the receiver

12 Real Estate Associates v. Superior Court, 60 Cal. 223.

13 Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414.

14 Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; Locke v. Klunker, 123 Cal. 231, 235, 55 Pac. 993; Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1006.

obtains possession he can hold all crops grown thereafter.[15] The grounds upon which purchasers of growing crops held them were that the mortgage did not cover them or that the mortgage was not executed in the manner required for a mortgage of personalty.[16] A railroad mortgage which authorized the trustee, in case of default of payment of interest, to take possession of the property and collect the income and profits authorizes the appointment of a receiver to take possession of accruing income and profits.[17] But a mortgage by a street railroad of its real and personal property, which is not executed in the manner required for mortgages of personal property, is void as to the personal property.[18]

DIRECTORS WINDING UP CAN PROBABLY BE SUED ONLY ON A CLAIM DISALLOWED BY THEM

The banking act of 1887, as amended in 1895 (now repealed), provided that, upon the bank becoming insolvent, the directors should manage its affairs in the process of liquidation and winding up, subject to certain exceptions. The supreme court declared that these directors, now trustees for liquidation, could not be

15 Cowdery v. London etc. Bank, 139 Cal. 298-309, 96 Am. St. Rep. 115, 73 Pac. 196.

16 Ibid. and Bishop v. McKillican, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552; Gregory v. Clabroughs Exrs., 129 Cal. 475, 478, 62 Pac. 72. It is not necessary, under the statute requiring all the parties to a personal property mortgage to make the required affidavit, that all the members of a corporation or partnership make this affidavit, Alferitz v. Scott, 130 Cal. 474, 477, 62 Pac. 735. It is sufficient if the secretary of the corporation make the required affidavit. Old Settlers' Inv. Co. v. White, 158 Cal. 236, 246, 110 Pac. 922; Yost v. Commercial Bank of Santa Ana, 94 Cal. 494, 496, 29 Pac. 858.

17 McLane v. Placerville etc. R. Co., 66 Cal. 606, 6 Pac. 748.

18 Bishop v. McKillican, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76.

sued upon a claim against the corporation, unless they had disallowed the claim; for, otherwise, the estate might be wasted in useless lawsuits.[19] The same reasoning would apply to a winding up under section 400 of the Civil Code, but there has been no decision on that point directly arising under the latter section.

RIGHT OF APPEAL NOW SUPPLANTS PROHIBITION

Since the amendment of the Code of Civil Procedure, allowing appeals from orders appointing receivers, that remedy takes the place of prohibition and other writs to determine the right or power of the court to appoint a receiver.[20]

[19] Argues v. Union Sav. Bk., 133 Cal. 139, 65 Pac. 307.

[20] Western etc. Mortgage Co. v. Superior Court, 22 Cal. App. 413, 134 Pac. 732; the same rule applies to certiorari (another kind of case), Postal etc. Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

CHAPTER XXV

INSOLVENCY—WHEN IS A CORPORATION INSOLVENT?

Section 3450 of the Civil Code declares "a debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due," and the subject of that title is "Assignments for the Benefit of Creditors." It was held that this definition of insolvency was applicable to the Insolvency Act of 1880.[1] But even under that act he was not insolvent because he did not have sufficient money on hand or in bank to meet all his debts as they became due, if he had property enough to enable him to pay all his debts, and that he intended to pay them, and did not contemplate insolvency.[2] The distinction between mercantile business and ordinary businesses, and between commercial centers and country towns is drawn, and the expression "from his own means" is given a broad meaning. In a very late case, the corporation sold bonds, secured by mortgage on its property, to raise funds with which to pay its debts. The bonds were attacked on the ground (among others) that the corporation was insolvent and the bonds were made to hinder, delay, etc., creditors, and were therefore fraudulent and void. "The assets of the corporation were, at the time, sufficient in value to pay the existing debts, but it was unable to pay its debts as they became due." The court said "this fact alone, however, does not make

1 Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305.

2 Sacry v. Lobree, 84 Cal. 41, 23 Pac. 1088. See In re Ramazzina, 110 Cal. 488, 42 Pac. 970. It is not necessary that the "means" shall be in this state, Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025.

the sale of the bonds fraudulent, nor raise a presumption of fraudulent intent.'"[3]

When a corporation is insolvent, an officer occupies a trust relation to its property, and to all interested, and he can not suddenly resign his office, knowing the corporation to be insolvent, and take a deed of all its property to secure a debt due to him; such a conveyance is void, being one to hinder, delay, and defraud other creditors. The assignee in insolvency proceedings may maintain an action to set the deed aside, notwithstanding it was executed more than thirty days before the filing of the petition in involuntary insolvency, although[4] the officer was not such the day he took the deed; the court held his resigning the day before for the purpose of taking the deed was part of the fraudulent scheme, and under such circumstances he is chargeable the same as if he were still a director; also that such a transfer does not come within the provisions of section 3452 of the Civil Code allowing a debtor to prefer one creditor to another. Still the court held that the question of fraudulent intent was one of fact, and not of law, and that the burden of proving it was on the party asserting it.

But the rule is different as to general creditors securing a preference. A bank which has received securities in the due course of business, untainted with fraud, may hold them; the corporation had the right under Civil Code, section 3432, to prefer the bank, which, however, must first exhaust its securities, before it can

[3] McKee v. Title Ins. etc. Co., 159 Cal. 206, 217, 113 Pac. 140.

[4] Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169. The insolvency proceeding appears to have been taken under the state law of 1895, and was a proceeding against the corporation. No reference to the National Bankruptcy Act of 1898 is made. See Keystone Driller Co. v. Superior Court, 138 Cal. 738, 742, 72 Pac. 398.

share with the other creditors in the remaining assets of the corporation.[5]

Where a proceeding in bankruptcy is taken under the state law the petition must show that the corporation belongs to a class not covered by the National Bankruptcy Act,[6] but the latter law does not supersede the state law as to any class of cases not expressly or impliedly included in it.

The superior court acquires jurisdiction when the petition in insolvency setting forth the necessary facts is filed, and the adjudication relates back to the time of the filing of the petition and renders void any subsequent transfer or incumbrance of the property of the debtor.[7]

The statute of 1880 (as does also the present law) requires the petition in involuntary insolvency proceedings to be filed in the county where the "debtor resides or has his place of business," or where he has resided for the last six months in case of voluntary proceedings. This was construed to permit filing proceedings in Humboldt County against a corporation doing most of its business there, although its residence and principal place of business "was in San Francisco County."[8]

It has been held that the California insolvency law applies to foreign corporations which have property and a place of business in the state, so far as involuntary proceedings in bankruptcy are concerned.[9] But

[5] Welch v. Sargent, 127 Cal. 72, 83, 59 Pac. 319.

[6] R. H. Herron Co. v. Superior Court, 136 Cal. 279, 89 Am. St. Rep. 124, 68 Pac. 814; at the time of the decision in this case mining corporations were not included in the Federal Act, but they are now included by the amendment of 1903.

[7] State etc. Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

[8] Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196.

[9] In re Castle Dome M. etc. Co., 3 Cal. Unrep. 1, 18 Pac. 794.

the converse of this is not true, that is, a foreign corporation[10] doing business in this state "can not become a voluntary insolvent, inasmuch as the petition must be filed in the county where the petitioner resides. This privilege of becoming a voluntary insolvent can be availed of only by residents of the state, whether natural or artificial persons." In this case, although doing all of its business in this state, the foreign corporation had not designated any agent upon whom process might be served, nor had it complied with the law in regard to filing a copy of its Articles of Incorporation with the secretary of state, and therefore had not submitted itself, so to speak, to the jurisdiction of the courts of this state. (Still, as we have seen, the law does not prohibit foreign corporations which have not complied with this law, doing business in this state).[11] In any event, this privilege is doubtless of little practical value to a foreign corporation.

Although a building and loan association may be actually insolvent its property is liable to attachment on suits to collect debts due from it until the commencement of an action by the attorney-general to enjoin it from doing business.[12]

Where creditors of a corporation fraudulently misappropriated funds of a corporation to the extent of making the corporation bankrupt, it was said the remedy of another creditor was not a suit for damages but a creditor's bill against them and the corporation

10 Keystone Driller Co. v. Superior Court, 138 Cal. 738, 744, 72 Pac. 398. See discussion of this doctrine under Civil Code, section 406, and doubt of its soundness when considered with reference to the federal constitution.

11 American etc. Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 536, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15.

12 Bories v. Union Building & Loan Assn., 141 Cal. 74 and 79, 74 Pac. 552, 554.

to compel them to account for the funds and to have them properly distributed.[13]

The claim of a domestic creditor of an insolvent foreign corporation to the funds of the corporation in this state, attached by him, is superior to that of a receiver of the corporation appointed in the state of its creation, and this without regard to the validity of the appointment of such receiver; no rule of comity or of law requires the recognition of the right of the receiver in such a case,[14] nor will any ancillary receiver be appointed in this state to take charge of the funds of the corporation in this state for that would accomplish the same purpose.[15]

The assignee of an insolvent corporation succeeds to all the rights of the insolvent to sue for and collect subscriptions to its stock.[16] The liability of a receiver for damages, whether occasioned prior or subsequent to his appointment, should be determined by the court appointing the receiver, although it is proper for the court to permit or direct the prosecution of a suit at law for that purpose.[17]

13 Reed v. Goldstein, 53 Cal. 296.

14 Lackmann v. Supreme Council etc., 142 Cal. 23, 29, 75 Pac. 583, and cases cited.

15 Clark v. Supreme Council etc., 146 Cal. 598, 80 Pac. 931.

16 Kohler v. Agassiz, 99 Cal. 9, 17, 33 Pac. 741.

17 Pacific Ry. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 13 L. R. A. 754, 27 Pac. 768.

CHAPTER XXVI

CHANGE OF NAMES

As we have already seen, under section 362 of the Civil Code, it is forbidden to change the name of a corporation by an amendment to its Articles of Incorporation; and that section 300a of the Civil Code requires[1] a certified copy of the decree changing the name to be filed in the office of the county clerk of each county where the original articles, or certified copies thereof, are required to be filed.

The only method of a corporation changing its name is contained in sections 1275 to 1279 of the Code of Civil Procedure, which sections are devoted almost entirely to the changing of the names of natural persons. They are as follows:

> **§ 1275.** Applications for change of names must be heard and determined by the superior courts. (Amended April 23, 1880; amendts. 1880, p. 117.)
>
> **§ 1276.** All applications for change of names must be made to the superior court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years of age, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if the father of such person be not living, name, as far as known to the

1 See these sections, and Amendment of Articles, ante, for comparison with the laws of other states.

petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific, or other corporation, or any corporation bearing or having for its name, or using or being known by the name of any benevolent or charitable order or society, may, by petition, apply to the superior court of the county in which its Articles of Incorporation were originally filed, or in which the property of such incorporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any friendly association. (Amended March 12, 1885; Stats. 1885, p. 112. 123 Cal. 526, 530.)

§ 1277. Upon the filing of the said petition the court shall thereupon make an order reciting the filing of the application, the name of the person or corporation by whom it is filed and the name proposed, and directing all persons interested in said matter to appear before the court, at a time and place specified, not less than four or more than eight weeks from the time of making such order, to show cause why the application for change of name should not be granted. A copy of the order to show cause must be published for four successive weeks in some newspaper of general circulation to be designated in the order, printed in the county, if a newspaper be printed therein, or, if no newspaper be printed in the county, a copy of such order to show cause shall be posted by the clerk of the court in three of the most public places in the county in which the court is held, for a like period. Proof must be made to the satisfaction of the court, of such publication, or posting, at the time of the hearing of the application.

(Amended March 3, 1905; Stats. 1905, p. 40. 123 Cal. 526).

§ 1278. Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court good reason against such change of name. On the hearing, the court may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name, or dismissing the application, as to the court may seem right and proper.

CORPORATIONS.

Provided, that if the applicant for a change of name be a corporation, such applicant shall file in court at the time of hearing the application, the certificate of the secretary of state that the name desired to be used by the applicant is not the corporate name of any corporation existing at said time, and that said name does not so closely resemble the name of any such existing corporation as will tend to deceive; provided, further, that if the applicant for a change of name be a banking corporation, such applicant shall file in court at the time of hearing the application, the certificate of the superintendent of banks that the name desired to be used by the applicant does not resemble so closely as to be likely to cause confusion, the name of any other bank previously formed under the laws of this state. (Stats. 1915, p. 108.)

§ 1279. A certified copy of the decree of the court, changing the name of a person or corporation, shall within thirty days from the date of such decree, be filed in the office of the secretary of state. (Amended March 18, 1907; Stats. 1907, p. 345.)

Only two corporation cases have reached our supreme court involving these sections. In one case[2] it

[2] In the Matter of La Societe Francaise etc., 123 Cal. 525, 56 Pac. 453, 787.

was held that these sections were not unconstitutional, so far as corporations were concerned, as delegating legislative power to the judiciary, and that the expression "or other corporation" contained in section 1276 is not limited to include only corporations like those specially named. Certainly the language of that part of the section is about as clumsily expressed as is ever witnessed in legislation. In the other case[8] questions of sufficient publication and conflict of names were determined. See Civil Code, section 290, Articles of Incorporation, sub-title "Names," for a more full statement of these cases. This method of changing names, as applied to corporations, is slow, awkward, and unsuitable; in these respects it is absolutely unexcelled, and unrivaled.

[8] In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

CHAPTER XXVII

WHERE A CORPORATION MAY BE SUED

Article 12, section 16, of the constitution is as follows:

> A corporation or association *may be sued* in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases.

It is not the purpose of this work to cover matters of procedure in suits or special proceedings in court. But the place where a corporation may sue or be sued is of great importance to the corporation in a business way, and the rules governing the same are different from those applicable to natural persons; for that reason some of the important points as to the venue of such actions will be noted.

The above provision of the constitution is so clearly expressed that it would seem difficult to raise any controversy as to the meaning of its terms; the uncertainty arises by reason of sundry decisions, and in the application of various sections of the codes under the last clause "subject to the power of the court to change of place of trial, as in other cases."

But the supreme court has enlarged this language as to each of the places where a corporation may be sued (except the last one, where the principal place of business is situated) by adding further provisions in substance that "if sued there the action must be tried

there," and subject to removal "not as in other cases,[1] but as in some cases." The court, *ex proprio vigore*, excepted one of the grounds for removal, that is, that the defendant is entitled to remove the case for trial to the county of his residence. These decisions stand directly opposed, in point of reason, to those arising under article 6, section 5, of the constitution, which declares that certain actions "shall be" commenced in certain places (instead of "may be") in which the court says that this language does not always mean that they must be tried where commenced.[2] The court has not given the same meaning to the words "be commenced," found in article 6, section 5, as to the words "be sued," in article 12, section 16, that is, that the suit shall also "be tried" there, although the two expressions are synonymous; for, when the complaint is filed and the summons served the defendant has been "sued," and the action is "commenced." That the trial was not contemplated by the words "may be sued" is put beyond question by the provision following giving the court power to remove the case for trial "as in other cases."

On the question of the right of a defendant corporation to remove a case for trial, "as in other cases," in the Fresno Bank case, at page 498, the *court adds* to those words "and for other reasons than that the county in which the action commenced is not the proper county." This addition, without question, amends the constitution. The plain meaning of "as in other cases"

1 Fresno Nat'l Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157; Trezevant v. Strong Co., 102 Cal. 47, 49, 36 Pac. 395; Miller & Lux v. Kern County L. Co., 134 Cal. 586, 589, 66 Pac. 856; Cook v. Ray Mfg. Co., 159 Cal. 694, 697, 115 Pac. 318, and cases cited in these cases.

2 Duffy v. Duffy, 104 Cal. 602, 38 Pac. 443; Staacke v. Bell, 125 Cal. 309, 314, 57 Pac. 1012; Miller & Lux v. Kern County L. Co., 140 Cal. 132, 135, 73 Pac. 836. See, also, Warner v. Warner, 100 Cal. 11, 34 Pac. 523.

is that the right of removal is to be unaffected by this section. The doctrine of this case has introduced inextricable confusion into the decisions, and hopeless conflict of reasoning in the endeavor to support them.

The facts upon which the Fresno Bank decision rests do not very satisfactorily appear in the opinion of the court. Section 5 of article 6 of the constitution was discussed, particularly as to the general jurisdiction of the superior courts throughout the state, and it was said that section 16 of article 12 of the constitution did not limit that jurisdiction, so far as corporations were concerned, to the counties therein contemplated. If the plaintiff in the original case was also seeking to have a lien declared upon the real estate (which would be the only reason for quoting the proviso of section 5), and if that is the ground upon which the change of place of trial was sought, in denying the right to a change of venue, the court necessarily decided that the court was not without jurisdiction because the suit was not brought against the corporation in the county where the real estate was situated—for, if it were not a corporation, the proper proceeding and the only power the court had in the premises was to dismiss the suit.

Later,[3] in interpreting the Fresno Bank decision, the court said that if the plaintiff "does not choose to bring his action in either of said counties [permitted by article 12, section 16, of the constitution] but brings it in another, the constitutional privilege [article 12, section 16] has no application, and section 5 of article 6 of the constitution governs. Under that the court had jurisdiction of the subject matter of the action." That is really saying that if the plaintiff does "choose" to sue the corporation in any "of said counties" he may do so; that if he does not sue [to enforce a lien upon real estate] in any of said counties the provision of

[3] Miller & Lux v. Kern County L. Co., 134 Cal. 586, 588, 66 Pac. 856.

"article 6, section 5, of the constitution governs," and that then such a suit must be brought in the county where the land is situated. What was incidentally said by the court when this case again came before it, about the limitations of section 5 above as to the place of commencement of certain actions is *dictum* only, because the court says[4] the case before it did not come within the proviso of article 6, section 5.

The court says that section 16 of article 12 "is of the nature of a code provision in regard to procedure, and is obviously self-executing, and differs from a statutory code provision only in that it can not be repealed, nor can its scope and operation be limited by a statute. So far as it conflicts with a statute, the statute must give way"; also that this section "apparently . . . does provide, as to actions against corporations, that suit may be brought, at the option of the plaintiff in counties which may not be the county in which the land alleged to have been injured is situated."

If the Grocer's Union case[5] is to stand (and it has not been expressly overruled) a corporation defendant would, notwithstanding this line of decisions, have the same right to remove the suit for trial as a natural person.

Article 6, section 5, of the constitution contains the following proviso:

> All actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate *shall be commenced* in the county in which the real estate, or any part thereof, affected by such action or actions, is situated.

[4] Miller & Lux v. Kern County L. Co., 140 Cal. 132, 134, 73 Pac. 836, overruling s. c. in department, 7 Cal. Unrep. 9, 70 Pac. 183.

[5] Grocer's Fruit Growing Union v. Kern County L. Co., 150 Cal. 466, 475, 89 Pac. 120.

This proviso is copied in the Code of Civil Procedure as section 78. This provision is to be strictly construed.[6] For the same reasons that article 12, section 16 was declared to be "of the nature of a code provision in regard to procedure" only, the above proviso of article 6, section 5, would be held to be no more than such a provision, and, like the former, that it could not be repealed or changed by the legislature.

Section 392 of the Code of Civil Procedure provides as follows:

> § 392. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code.
>
> 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property;
>
> 2. For partition of real property;
>
> 3. For the foreclosure of all liens and mortgages on real property.

It seems to be clearly established that any suit of any nature, unless it should be those named in article 6, section 5, of the constitution, may be brought against a corporation in the county where its principal place of business is located, or, in the certain cases named, at the respective places designated in article 12, section 16, of the constitution.

It has not yet been decided, as to corporations, that the actions named in article 6, section 5, of the constitution must be brought in the county where the land lies, irrespective of the residence of the corporation. Our supreme court, in the Grocer's Union case, said that

[6] Miller & Lux v. Kern County L. Co., 140 Cal. 132, 134, 73 Pac. 836.

article 12, section 16 is as though it read "Any and all actions may be commenced against corporations in the county of the principal place of business of the corporation," subject to change of place of trial as provided by law.

The decisions where the objection to the jurisdiction of the court rested *only* upon article 6, section 5, of the constitution have been in cases between natural persons, or where the residence of the corporation did not appear.[7] In those cases it was said that if the suit was not brought in the county where the land lay the court was without jurisdiction, and should dismiss the suit.

But, even if brought where the land is situated, it may be removed, in a proper case.[8] In the several Miller & Lux cases[9] it was held that the case presented was not one coming under section 5, above, of the constitution. If such an action is brought in the county where the land lies, the defendant, a natural person, can not remove it to the county of his residence.[10]

[7] Fritts v. Camp, 94 Cal. 393, 29 Pac. 867; Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154; Pacific Yacht Club v. Sausalito etc. Water Co., 98 Cal. 487, 489, 33 Pac. 322, and Granger's Bank v. Superior Court, 4 Cal. Unrep. 130, 33 Pac. 1095, not officially reported. In neither of these corporation cases does their residence appear, nor was the fact that they were corporations raised or considered.

[8] Hancock v. Burton, 61 Cal. 70; Duffy v. Duffy, 104 Cal. 602, 604, 38 Pac. 443.

[9] Miller & Lux v. Kern County L. Co., 134 Cal. 586, 66 Pac. 856, reversing 7 Cal. Unrep. 9, 70 Pac. 183, and 140 Cal. 132, 73 Pac. 836. In Miller & Lux v. Kern County L. Co., 7 Cal. Unrep. 9, 70 Pac. 183 (decided in department), the effect of section 16, article 12 of the constitution was not presented or considered on the question of venue, the court holding that the court below was without jurisdiction under article 6, section 5 of the constitution. This decision was reversed by the court in bank on the ground that the complaint did not show a case to which article 6, section 5, was applicable, 140 Cal. 132, 73 Pac. 836.

[10] Robinson v. Williams, 12 Cal. App. 515, 107 Pac. 705.

The Grocer's Union case,[11] where both parties were corporations, was one for the specific performance of a contract for the sale of land; the court said such a case did not come within those enumerated in article 6, section 5, of the constitution, but that the corporation (though properly) sued in the county of its residence could remove the suit to the county where the land was situated. This right of removal was made to rest only on the fourteenth amendment to the constitution of the United States, i. e., that this right of removal could not be denied to a corporation when given to a natural person. It was later admitted, in accordance with decisions of the United States supreme court, that this ground was not good.[12] Neither does a suit to establish a trust in land come within article 6, section 5, of the constitution.[13] The "public policy" reasoning in Cook v. Ray Mfg. Co. and the Grocer's Union cases is not sustained, but rather defeated, by a number of the decisions above cited.

An expression in Cook v. Ray Mfg. Co., at page 698, indicates that section 16 of article 12 of the constitution relates only to personal actions. The last provision is not limited to any kind of actions; the section provides that any suit may be brought against a corporation in the county where it resides, or, in certain special cases, that it may be sued in some other county. No exception is made. The general sense of the section is confirmed by the semicolon after the word "occurs." The office of the semicolon is "to indicate a turn in the sense too distinct to use a comma; often it is placed between what might be made separate sentences," or to avoid repeating the subject clause. In this sentence it is equivalent

11 Grocer's Fruit Growing Union v. Kern County L. Co., 150 Cal. 466, 475, 89 Pac. 120.

12 Cook v. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318.

13 Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958.

to saying at length "or a corporation may be sued in the county where the principal place of business," etc. Nor can the words of the first clauses be limited to personal actions, for a "contract" may create a "lien upon real estate" the payment of which may be agreed to be made in some other county, and hence the obligation is to be there "performed"; it may be agreed that a deed to real property shall be delivered at an agreed place in some other county and if this is not done the "breach" occurs in such other county; numberless like instances could be noted. In short, this section covers actions concerning real estate, the same as any other kind of actions, if the plaintiff "chooses" to sue the corporation in any of the counties contemplated; if he does not so elect, then he will be governed by other statutes as to the place of the commencement. As to "policy" it will be observed that this section confers a privilege or benefit upon natural persons; not benefits but burdens on corporations. It can not be logically contended, so far as the order of appearance of the sections is concerned, that the right is taken away by article 6, section 5, because that article is followed by article 12, and naturally the later provision limits the earlier, and not the older limit the later; article 6 is devoted to courts generally, while article 12 is wholly devoted to corporations, defining them and establishing their rights, duties, and limitations, therefore the proviso in section 5, article 6, can reasonably apply only to natural persons.

The place where a suit is commenced is of little importance, but in point of convenience the place where it is tried may be of great importance to the defendant. The constitution does not say where such cases must be tried. If the plaintiff elects to sue the corporation at its place of residence, certainly the plaintiff can not complain; but if the corporation objects to being sued in certain real estate cases at its place of residence,

under the code sections (Grocer's Union case) it may remove the suit to the county where the real estate lies; no injury is done to any one.

If both parties desire the action to be tried in the county where the defendant corporation resides, no valid objection can exist. No "general policy" of the constitution on this subject can be discovered in regard to either the place of commencement or the trial of actions concerning real estate. Certainly it is just as important that actions be commenced in the county where the real estate is to recover an estate or interest therein, as to recover the corpus; or to compel the performance of a contract to convey it to the plaintiff, as to recover the possession of it; or to determine an estate or interest therein, as to quiet the title thereto; or to establish a trust in it, as to enforce a lien upon it. But it has been decided that in none of the cases mentioned in the first member of each of the above clauses is it necessary that the action against a corporation be commenced in the county where the real estate is situated. A suit to settle an estate can not be brought in the county where the land is situated if the deceased resided in some other county in the state. It can not be said that it is not as important that a suit to partition real property should be commenced in the county of its location, as one to establish a lien upon it; or one for injuries to real property, as one to recover it; yet the constitution does not make this requirement. But by the provisions of the Code of Civil Procedure, all of these suits may be removed for trial to the county where the real estate is situated, if the defendant so elects. By virtue of the constitution the jurisdiction of each superior court runs throughout the state and, speaking generally, a defendant may be sued in any county, but the decisions are almost without number that if the defendant desires to have the suit tried in

any other county than where the suit is brought, he must declare that desire, and take the proper proceedings to remove the suit thereto.

There is no virtue in the argument that the official records of the county should contain all proceedings affecting real estate therein, for the Code of Civil Procedure, section 400, provides that "when an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate is situated," etc., the clerk of the court where the judgment was rendered must transmit a copy of the judgment to the county where the land is, and that the same shall be recorded by the clerk of the court there. The people of the county are interested only in the final judgment; not in the evidence, or the proceedings prior thereto.

The above sections of the constitution have no application to a municipal corporation; they apply only to private business corporations. A municipal corporation must be sued in the county where it is situated, and a reclamation district in the county where it has its principal place of business.[14] And it was held that an action against a drainage district to recover the value of land taken by it for the construction of its system was not one to recover damages for "injuries to real property," within the meaning of section 392 of the Code of Civil Procedure.

RESIDENCE OF A CORPORATION

On the question of the residence of a corporation with reference to the statute concerning the place of trial of an action it was first held that it was where its principal place of business was situated, the court

14 Buck v. City of Eureka, 97 Cal. 135, 31 Pac. 845; Gallup v. Sacramento etc. Drainage District, 171 Cal. —, 151 Pac. 1142.

saying, "modern decisions very generally concur in giving corporations a local existence, like persons. . . . Every corporation has some locality where its principal office or place of business is established, and it may very properly be said to reside at such locality, and to be included within that term as used in section 20 of the Practice Act."[15] This case was later overruled,[16] the court saying "there is no law, statutory or common, in this state which defines the place of residence of a corporation . . . there being no law defining what is the place of residence of a corporation, we must hold that section 395 of the Code of Civil Procedure has no application here."

But the rule stated in the Jenkins case was later reaffirmed, and the two cases in 65 Cal. distinguished, and on this point overruled,[17] and it is now unquestioned and established law that the place of residence of a domestic corporation is where its principal place of

15 Jenkins v. California Stage Co., 22 Cal. 537, 538. The defendant in this case was probably a domestic corporation, but that statement is not made.

16 California Southern R. Co. v. Southern Pacific R. Co., 65 Cal. 394, 4 Pac. 344. No statement is made as to whether the defendant was a domestic or foreign corporation.

17 Cohn v. Central Pac. R. Co., 71 Cal. 488, 12 Pac. 498, which overrules California Southern R. Co. v. Southern Pacific R. Co., 65 Cal. 394, 4 Pac. 344; as to the Southern Pacific case, "But as to the point of residence of a corporation, these cases were overruled in Cohn v. Central Pac. R. Co., 71 Cal. 488," 12 Pac. 498; Fresno Nat'l Bank v. Superior Court, 83 Cal. 491-497, 24 Pac. 157; Buck v. Eureka, 97 Cal. 135, 139, 31 Pac. 845, a municipal corporation case; McSherry v. Pennsylvania etc. Min. Co., 97 Cal. 537-643, 32 Pac. 711; Trezevant v. Strong Co., 102 Cal. 47, 36 Pac. 395; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; the latter cases all apparently domestic corporation cases, but no distinction was drawn between domestic and foreign corporations, either in the statement of the cases or the reasoning; Bloom v. Michigan Salmon Min. Co., 11 Cal. App. 122, 124, 104 Pac. 324; Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 238, 104 Pac. 698; Gallup v. Sacramento etc. Drainage Dist., 171 Cal. —, 151 Pac. 1142.

business is located. The same reasons and general principles apply with equal force to establish the residence of a foreign corporation, lawfully doing business in the state, as the county where its principal place of business is located where it must also file a copy of its Articles of Incorporation (Civil Code, section 408). But the district court of appeal has decided otherwise. See chapter on "Foreign Corporations," sub-title, "Venue of Actions."

It was early held that the right given by this section of the constitution to bring a suit against a corporation in either of the places named gives also the right to have the action tried there (which has caused so much confusion on this subject, as seen in the foregoing pages), subject only to the right to a change of venue for some other reason than that of the residence of the defendant (the corporation).[18] The principal of the "other reasons" (or "cases") are found, as has been seen, under section 392 of the Code of Civil Procedure which requires actions to recover real property or to determine an interest therein, partition, foreclosure of mortgages, etc., to be tried, and under article 6, section 5, of the constitution which requires all actions to recover, or to quiet title to or for the enforcement of liens upon real estate to be also commenced, in the county where the real estate affected or some part thereof lies.

Section 395 of the Code of Civil Procedure provides that all other actions must be tried in the county where the defendants, or some of them, resided at the time of the commencement of the action, etc. (no mention being made of corporations).

[18] Trezevant v. Strong Co., 102 Cal. 47, 36 Pac. 395; Fresno Nat'l Bank v. Superior Court, 83 Cal. 491, 498, 24 Pac. 157; Lewis v. South Pacific etc. R. Co., 66 Cal. 209, 5 Pac. 79; Miller v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856; Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

The cases holding that a corporation can be sued in any of the places mentioned in this provision of the constitution (article 12, section 16), without regard to its residence, are very numerous, the principal of which are cited in the noted below.[19]

In the Grocer's Union case[20] in which our supreme court swept away all distinctions between corporations and natural persons as to the place of trial of actions where real estate is directly affected, the decision could not and did not rest on any conflict of the provisions of our own constitution, for they had been declared to be

[19] Lewis v. South Pacific etc. R. Co., 66 Cal. 209, 5 Pac. 79; Cohn v. Central Pacific R. Co., 71 Cal. 488, 12 Pac. 498; Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 Pac. 686; Chase v. South Pacific etc. R. Co., 83 Cal. 468, 23 Pac. 532; Fresno Nat'l Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157; Yore v. Bankers' etc. Life Ass'n, 88 Cal. 609, 26 Pac. 514; Kendrick v. Diamond Creek etc. Min. Co., 94 Cal. 137, 29 Pac. 324; Buck v. Eureka, 97 Cal. 135, 31 Pac. 845; McSherry v. Pennsylvania etc. Min. Co., 97 Cal. 637, 32 Pac. 711; White v. Fresno Nat'l Bank, 98 Cal. 166, 32 Pac. 979; Trezevant v. Strong Co., 102 Cal. 47, 48, 36 Pac. 395; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Griffin v. Magnolia Cannery Co., 107 Cal. 378, 40 Pac. 495; Lakeshore Cattle Co. v. Modoc Land etc. Co., 108 Cal. 261, 41 Pac. 472; Ivey v. Kern County Land Co., 115 Cal. 196, 200, 46 Pac. 926; Bowers v. Modoc Land etc. Co., 117 Cal. 50, 48 Pac. 979; Brown v. San Francisco Sav. Union, 122 Cal. 648, 55 Pac. 598; Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856; Winchester v. Howard, 136 Cal. 432, 439, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855; Tingley v. Times-Mirror Co., 144 Cal. 205, 77 Pac. 918; Grocer's Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120; McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548; Ludington Exploration Co. v. La Fortuna etc. Min. Co., 4 Cal. App. 369, 88 Pac. 290; Eddy v. Houghton, 6 Cal. App. 85, 91 Pac. 397; Pittman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699; Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237, 104 Pac. 698; Yuba County v. North America etc. Min. Co., 12 Cal. App. 223, 107 Pac. 139.

[20] Grocer's Fruit Growing Union v. Kern County Land Co., 150 Cal. 466-474, 89 Pac. 120; followed in Robinson v. Williams, 12 Cal. App. 515, 520, 107 Pac. 705.

harmonious by our supreme court in almost numberless cases, some of which are cited in the preceding note. As we have seen, this decision was made to rest solely upon the fourteenth amendment to the federal constitution, which prohibits a state from making any laws which abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws.

The court said: "Where the subject matter of the action—land—is made the test for fixing the place of trial of the action, no reason or distinction appears, or can be made to appear, why the right should be given to a natural person to have such an action tried in the county where the land is situated, and the same right should be denied to an artificial person, a corporation. . . . If the situation were reversed the absurdity would be patent. A law which granted to a corporation the right and denied it to a natural person would be held arbitrarily discriminative without a moment's hesitation," and the decision was distinguished from the prior contrary decisions of our supreme court on the ground that in none of the earlier cases was the point raised that such a construction works a violation of the defendant's rights under the fourteenth amendment to the federal constitution.

The argument in a later case (Cook v. Ray, *supra)* that a real distinction exists between corporations and natural persons in regard to personal actions while one does not exist as to real actions, is not supported, for we have already seen that numberless cases which follow the persons may vitally affect liens upon, or the title to, or the possession of real estate, and that inextricable confusion exists, both as to the place of commencement and the place of trial of such actions; and, further, the legislature having drawn none, a court should not create such a distinction.

The decision in the Grocer's Union case was made about three years after the decision in Cincinnati etc. v. Snell, 193 U. S. 30, 48 L. Ed. 604, 24 Sup. Ct. 319, although no citation of or reference to it was made. The latter case was one where a state law gave a natural person the right to remove the case for trial to another county on certain grounds, while denying that right to a corporation. The supreme court of the United States declares that such a state law is not in violation of the fourteenth amendment, and does not deny to the corporation the equal protection of the laws, because, in the forum to which the case would be sent, equality of law governs and equality of administration prevails and "it is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided, equal laws prevail." In an earlier case, Backus, etc., v. Fort Street, etc., 169 U. S. 557-559, 42 L. Ed. 859, the supreme court of the United States said "all that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made . . . and when this has been provided, there is that due process of law which is required by the federal constitution." Thus falls all of the support upon which the Grocer's Union case is made to rest, and it seems to be a wreck.

That the right of removal or the denial of that right, under such circumstances, is wholly unaffected by the fourteenth amendment was admitted by our own supreme court in a later case,[21] when the decision in the Snell case was considered.

[21] Cook v. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318. The cases of Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856, and s. c. 140 Cal. 132, 73 Pac. 836, which were practically overruled in the Grocer's Union case, were virtually revived again

The court, however, finds a way to harmonize the *state* constitution with section 392 of the Code of Civil Procedure by saying that the state constitution expressly provides that causes against corporations are "subject to the power of the court to change the place of trial, as in other cases," and that the constitutional provision is as though it read, "any and all actions may be commenced against corporations in the county of the principal place of business of the corporation, provided, however, that the courts may change the place of trial of such actions in accordance with the laws governing such places of trial," and adds: "So construed, all our laws touching change of venue and place of trial become uniform and harmonious."

Section 16, above, of the constitution applies to actions founded on tort as well as those founded on contract.[22]

If a corporation is one of several defendants, it may be sued in any county where any one of the defendants resides.[23] The burden is on the plaintiff to show some of the "other" facts if he sues a corporation in some other county than that of its residence.[24] And where a suit was brought by stockholders in behalf of the corporation to set aside a mortgage given by it, the venue should be the residence of the mortgagee, notwith-

in Cook v. Ray Mfg. Co. The latter case was a suit for damages for breach of warranty in the sale of personal property; the corporation, residing in San Francisco, but being sued in Santa Clara County, where the goods were sold, sought to remove the case to San Francisco, which was refused.

22 Lewis v. South Pacific etc. R. Co., 66 Cal. 209, 5 Pac. 79; Miller & Lux v. Kern County Land Co., 134 Cal. 586-588, 66 Pac. 856.

23 Aisbett v. Paradise Mountain etc. Min. Co., 21 Cal. App. 267, 131 Pac. 330.

24 Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 169, 133 Pac. 978.

standing the corporation and other stockholders were defendants.[25]

If one who should be a plaintiff, but who refuses to become such and is therefore made a nominal defendant, he is not a "defendant" within the meaning of section 395 of the Code of Civil Procedure, but substantially a plaintiff, and his joinder as a defendant will not prevent the non-resident defendant from changing the place of trial.[26]

An anomalous case as to the place where a suit against a corporation could be brought and tried arose under the state insolvent law. That law provided that the petition in such a proceeding must be filed in the county where the "debtor resides, or has his place of business." The court said a tradesman's residence may be in one county and his place of business be in another and that a corporation occupies no better or different position, and while a corporation's residence is the place named in its Articles of Incorporation as its principal place of business, but, as in the case of an individual, its actual place of business may be in another county. In that case it was conceded that while the corporation's "principal place of business" was in San Francisco, its mill was located in Humboldt County where all its operations were carried on and the liabilities contracted and the creditors lived, and therefore Humboldt County was its place of business as distinguished from its residence, and the proceeding was properly brought in Humboldt County.[27] It would seem that the provisions of the constitution would have settled this question, the liabilities all arising there,

25 Bailey v. Cox, 102 Cal. 333, 36 Pac. 650.

26 Donohoe v. Wooster, 163 Cal. 114, 124 Pac. 730.

27 Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196. We do not think that this case has ever been cited on either of these points.

without confusing the question as to the principal place of business or residence. Also it was stated that the (at least this) place of business could be proved by parol.

In an action to "foreclose" the title of a pledgor to certain stock and to sell it for the payment of the money borrowed on it, the plaintiff made the corporation also a defendant alleging that it made some claim to the stock without setting out the nature of the claim. The court held the corporation was a proper defendant, that it was not necessary to set out the nature of its claim, and the suit being brought in the county of the residence of the corporation, the pledgor could not remove the case to the county of his residence.[28] But this was evidently a ruse on the part of the plaintiff, and by making such a showing (the answer of the corporation would probably be necessary for that purpose) the place of trial of the action could doubtless have been removed under the doctrine of the decisions next noted.

In a case where a promissory note was given to a bank by a corporation, no place of payment being mentioned, it was held (contrary to the rule in attachment cases) not only that it was payable in this state, but was payable at the bank, and that that was the place of performance within the meaning of this statute.[29] In attachment proceedings, however, if a promissory note is made by a foreign corporation, in the state of its residence, and no place of payment is named in the note, it is payable in the foreign state and attachment will not lie in a suit brought thereon in this state.[30]

28 Hellman v. Logan, 148 Cal. 58, 82 Pac. 848.

29 Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855.

30 Atwood v. Little Bonanza etc. Co., 13 Cal. App. 594, 110 Pac. 344.

In a case[81] where a corporation residing in one county is sued in another county upon a cause of action arising in a third county in which suit a person residing in the third county against whom the plaintiff had no cause of action was made a defendant for the purpose of conferring jurisdiction upon the court in the third county, the court held that the device was a fraud, and the cause should be removed to the county of the place of residence of the corporation. No question of the federal constitution arose in this case, the court citing sections of the code and the state constitution in support of its statement.

A right of action against a California corporation for damages for false representations in the sale of stock is transitory,[82] and a suit was brought against it in a county not its residence. The court said, as there was no showing that the suit was brought in the county where the contract was made or was to be performed, or in which the obligation arose (citing the state constitution above) or in which the principal place of business of the corporation was situated, the corporation was entitled under section 395 of the Code of Civil Procedure to have the case transferred for trial to the county of its residence, the county where it had its principal place of business. The court further said, if mistaken in that view, the corporation was entitled to the change under the decision in Grocer's etc. Union v. Kern County Land Co., *supra,* adding "What is true of

81 McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548. But the plaintiff, including the defendants residing in other counties, waives the right to have the case tried in the county of his own residence, Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; or this other defendant may remove the case to his own county, Griffin v. Magnolia etc. Cannery Co., 107 Cal. 378, 40 Pac. 495; Bond v. Karma-Ajax etc. Min. Co., 15 Cal. App. 469, 474, 115 Pac. 254.

82 Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237-241, 104 Pac. 698.

the rights of corporations arising under section 392 must be true of the rights of corporations arising under section 395. We see no escape from this conclusion."

A suit by a county against a non-resident California corporation, brought in the county suing, on motion of the defendant under section 394 of the Code of Civil Procedure, must be transferred for trial to some other county. The court says the provision in the state constitution "subject to the power of the court to change the place of trial as in other cases" is authority for looking to section 394 for the "other cases" referred to in the constitution.[33]

In the case[34] of a foreign corporation owning and operating a railroad in this state, there being no evidence that it had complied with section 408 of the Civil Code by filing a copy of its Articles of Incorporation with the secretary of state and a certified copy of the same in the office of the county clerk where its principal place of business was located, it was held that it was not entitled under the provisions of article 12, section 16, of the constitution, nor under section 395 of the Code of Civil Procedure, to remove the case for trial to the county where it had its principal place of business. It was also said that there is no statute giving a foreign corporation a local (county) residence where alone it can be sued.

33 Yuba County v. North America etc. Min. Co., 12 Cal. App. 223-227, 107 Pac. 139.

34 Waechter v. Atchison etc. R. Co., 10 Cal. App. 70, 101 Pac. 41; see, also, Pitman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699, which also says non-resident defendants are not entitled to change or control the place of trial.

CHAPTER XXVIII

MANNER OF COMMENCING ACTIONS AGAINST AND SERVICE UPON CORPORATIONS

So far as sections 410, 411, and 412 of the Code of Civil Procedure apply to corporations, they are as follows:

§ 410. A copy of the complaint must be served, with the summons, upon each of the defendants.

§ 411. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state, to the president or other head of the corporation, vice-president, secretary, assistant secretary, cashier, or managing agent thereof;

2. If the suit is against a foreign corporation, or a non-resident joint stock company, or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier or secretary.

§ 412. Where the person on whom service is to be made . . . is a foreign corporation having no managing or business agent, cashier or secretary or other officer . . . within the state, and the fact appears by affidavit to the satisfaction of the court or a judge thereof (in the same manner as in case of non-resident persons; such service may be made by publication).

Or if a foreign corporation has designated some person, under the provisions of section 405 of the Civil Code, upon whom process may be served,

Such process may be served on the person so designated,

Or, in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such corporation.

Where, under the provisions of a statute, practically identical with the first subdivision of section 411 above, service of summons was made upon one "who was in possession of the property" of the corporation, there being no showing that he was one of the officers named, it was held that a judgment by default founded upon such service was invalid;[1] and a judgment upon a service of summons "upon J. S., one of the proprietors of the company," was set aside for the same reason.[2] A teller of a bank, whose only duty is to receive and pay out money, is not a managing agent of the corporation, much less one of the officers named or other head of the corporation, and the service of an attachment or garnishment upon him is ineffective as against the corporation.[3] A service upon the *de jure* president was held good, although he had ceased attending meetings, and had removed from the county and a president *pro tem* had been elected in his place.[4] But an order to show cause why a corporation should not be punished for contempt for disobeying an injunction, when the officers conceal themselves, may be served on the attorneys of the corporation.[5]

A sheriff's return that he served the summons on the president and secretary of the corporation is *prima facie* evidence that the persons named in the return

1 Aiken v. Quartz Rock etc. Min. Co., 6 Cal. 186.

2 O'Brien v. Shaw's Flat etc. Canal Co., 10 Cal. 343.

3 Kennedy v. Hibernia Sav. etc. Soc., 38 Cal. 151.

4 Eel River etc. Co. v. Struver, 41 Cal. 616.

5 Golden Gate etc. Co. v. Superior Court, 65 Cal. 137, 3 Pac. 628; Eureka Lake etc. Canal Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490; Foley v. Foley, 120 Cal. 33, 39, 65 Am. St. Rep. 147, 52 Pac. 122.

were such officers,[6] and the same is true of the affidavit made by a private person.[7]

A clerk in a store of a foreign mining company is not a managing agent or cashier of the company within the meaning of the law as to the levy of attachments.[8]

"Under the provisions of this section, in order that the court may get jurisdiction over a foreign corporation, it is requisite that such corporation shall be doing business within the state at the time that the summons is served."[9]

Nor will it be presumed that the president of such a corporation, who is served with process within this state, is the managing or business agent of such foreign corporation.[10]

Even a domestic corporation may, in a proper case, be served by publication. For the purposes of the above sections, the court holds that the word "person" includes domestic corporations, and an affidavit showing that the corporation had no officer or agent within the state upon whom service of summons could be made, and that all of them had departed from the state was sufficient, and held that, in the sense of this section, the corporation had departed from the state, and service by publication was warranted and sufficient.[11]

A suit brought by attorneys at the instance of the president and secretary (the other directors being

6 Rowe v. Table Mt. Water Co., 10 Cal. 441.

7 Keener v. Eagle Lake Land etc. Co., 110 Cal. 627, 630, 43 Pac. 14.

8 Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765,

9 Herron Co. v. Westside etc. Co., 18 Cal. App. 778, 780, 124 Pac. 455; Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289. So as to a corporation which has forfeited its charter under the license law, Carpenter v. Bradford, 23 Cal. App. 560, 138 Pac. 946.

10 Ibid.

11 McKendrick v. Western Zinc etc. Co., 165 Cal. 24, 130 Pac. 865.

dead) and the stockholders is legally instituted, and third parties have no ground of objection.[12]

A complaint against the "Independent Company" and a service upon R., a "member" of that company, will not support a judgment against the "Independent Tunnel Company," although the summons was addressed to that company.[13] But if a corporation sued under a wrong name answers by its true name, and judgment is rendered against it by its true name, the judgment is good.[14]

The question whether a person served as an officer of the corporation is such officer is a question of fact to be determined by the court.[15]

Where the defendant's corporate character is alleged and not denied, it is error to find that it is not a corporation.[16]

In an action by a corporation, the fact that the complaint does not state that the plaintiff is a corporation is not sufficient to sustain either a general or special demurrer to the complaint;[17] this objection goes only to the capacity of the plaintiff to sue, and can be raised only by answer; nor is the omission of such an allegation in regard to the character of the defendant necessary to give the court jurisdiction either over the person of the defendant or the subject matter of the action.[18]

12 San Diego Gas Co. v. Frame, 137 Cal. 441, 446, 70 Pac. 295.

13 King v. Randlett, 33 Cal. 318.

14 Mahon v. San Rafael etc. Road Co., 49 Cal. 269; Haynes v. Backman, 3 Cal. Unrep. 710, 31 Pac. 745, 746.

15 J. L. Mott Iron Works v. West Coast etc. Supply Co., 113 Cal. 341, 45 Pac. 683.

16 Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46, 56 Pac. 1026.

17 Los Angeles R. Co. v. Davis, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865.

18 Crouch v. H. L. Miller etc. Co., 169 Cal. 341, 146 Pac. 880.

And in a collateral attack upon the judgment, the fact that its true name was not added to the complaint by amendment, it being sued and served under the name of John Doe, is immaterial, even if such omission would be available in a direct proceeding by appeal.[19]

For service of process on foreign corporations see chapter on "Foreign Corporations," post.

CORPORATION MAY RECORD CERTIFICATE OF RESIDENCE FOR SERVICE OF PROCESS

Section 1163 of the Civil Code is as follows:

> § 1163. Any person, firm, or corporation, may record in the office of the county recorder of any county in the state of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm, or corporation.
>
> The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment.
>
> Such person, firm or corporation may upon a change of place of residence file affidavit as herein provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided.
>
> The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled "Index to certificates of residence," in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed. (Enacted March 18, 1905; Stats. 1905, p. 139.)

[19] Ibid.

This section is recent, being first adopted in 1905. This section provides only for the place of service; the persons upon whom service may be made are named in other sections of the statute, already considered. As the place of residence of a corporation is its principal place of business, which is fixed in its Articles of Incorporation, this section could serve little more than to locate the street and number in a city, or the town, or village, or governmental section of land, or other description, if not located in a town or village.

CHAPTER XXIX

ATTACHMENT AND EXECUTION—LEVY ON SHARES

Section 541, and subdivision 4 of section 542, and section 688 of the Code of Civil Procedure in regard to levying attachments and executions on shares of stock are as follows:

§ 541. The rights or shares which the defendant may have in the stock of any corporation or company, together, with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution. (Enacted March 11, 1872.)

§ 542, subd. 4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

§ 688. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment. Gold dust must be returned by the officer as so [much] money collected at its cur-

rent value, without exposing the same to sale. Until a levy, property is not affected by the execution. (Amended March 19, 1907; Stats. 1907, p. 683.)

A person was employed by a foreign mining corporation as a clerk in its store; although he had the custody of money belonging to the corporation and kept the accounts of the men employed and paid them, such employment and duties did not constitute him the cashier or managing agent of the corporation upon whom a writ of attachment against the corporation could be served. The word cashier in the above sections refers to an executive officer of the corporation, as the cashier of a bank, and not to a simple employee, who is not a managing agent of the corporation.[1]

A sale of shares under execution to the judgment creditor for a grossly inadequate price, as for twenty-six dollars when the value of the shares was over two thousand dollars, is alone sufficient to warrant setting aside the sale when the owner was not guilty of laches, though all the proceedings were in accordance with the letter of the law.[2]

It is not necessary, under section 688 above, for the sheriff to have manual possession of the stock certificate at the time of the sale, nor that he should deliver the certificate to the purchaser; the purchaser in good faith at such a sale is entitled to have a certificate for the stock so purchased by him issued to him by the corporation. The person holding the certificate, if found, could be compelled to surrender it.[3]

1 Blanc v. Paymaster Min. Co., 95 Cal. 524-531, 29 Am. St. Rep. 149, 30 Pac. 765.

2 Odell v. Cox, 151 Cal. 70, 90 Pac. 194.

3 West Coast etc. Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

It was said in this case that "in order that an assignee or pledgee of a certificate may protect his rights, as against a purchaser at execution sale, he must cause a reissue to him of a certificate, or he must serve notice on the corporation that he holds the certificate as such assignee or pledgee." But this was *dictum,* for the purchaser at the sheriff's sale was ignorant of the fact that the stock had been pledged, and apparently the pledgee was ignorant of the proceedings to sell. Besides, notice to the corporation could not be notice to a purchaser, for the latter has no right of access to the papers, notices, etc., among the records and papers of the corporation.[4]

But no rights of innocent purchase arise by the mere fact of the levy of either an attachment or an execution. In the meantime, between the levy and the sale, the pledgee or owner may demand a transfer of the shares on the books of the corporation to his own name, which done, the purchaser at such a sale takes subject to the rights of the transferee,[5] For further consideration of this subject see section 324 of the Civil Code as to transfers of stock, and discussion thereof.

[4] It is stated in Spreckels v. Nevada Bank, 113 Cal. 272, 277, 54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329, that the court entertains no doubt but that the pledgee has the right to cause a proper entry on the books of the corporation of the transaction between the pledgor and himself, under Civil Code, section 324; but there is no warrant for this belief; it would be introducing the most novel and unheard of practice in conducting the business of a corporation and make the corporation the custodian of and responsible for the correct interpretation of contracts between its stockholders. See, also, Manning v. App etc. Min. Co., 171 Cal. —, 154 Pac. 301.

[5] National Bank etc. Co. v. Western Pacific R. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676. All the California cases on this subject are cited and thoroughly reviewed and considered; there was no dissenting opinion and a hearing in bank was denied, so it may be considered that this question is permanently settled in this state.

DIVIDENDS HELD BY ATTACHMENT

All dividends accruing on attached stock are impounded with the stock itself, and pass to the execution purchaser.[6] But a subsequent sale of the stock by the purchaser at the execution sale does not carry with it any dividends declared and dues prior thereto, even if declared and due while the stock was held by the attachment.

[6] Cates v. Consolidated Realty Co., 25 Cal. App. 531, 144 Pac. 301; McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175, (dictum).

CHAPTER XXX

ACKNOWLEDGMENT OF INSTRUMENTS

Sections 1185 and 1190 of the Civil Code are as follows:

§ 1185. The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf. (Stats. 1905, p. 603.)

§ 1190. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

"STATE OF ———, } ss.
COUNTY OF ——— }

"On this ——— day of ———, in the year ———, before me (here insert the name and quality of the officer), personally appeared ———, known to me (or proved to me on the oath of ———) to be the president (or the secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some one other than the president or secretary, insert: known to me [or proved to me on the oath of ———] to be the person who executed the within instrument on behalf of the corporation therein named) and acknowledged to me that such corporation executed the same." (Stats. 1905, p. 603.)

Ordinarily the word "execute," as applied to written instruments, includes the delivery of the instrument,

but as used in these sections its meaning is restricted to the signing and sealing.[1] The truth of the certificate may be disputed.[2]

A notary public who certifies to an acknowledgment is responsible for all damages caused by reliance thereon if the instrument is forged, or the person acknowledging it falsely impersonates the person by whom it is actually, or purports to be, signed.[3] It is not enough that the person acknowledging it is introduced to the notary by a responsible person; if he does not know the person making the acknowledgment to be the person described in the instrument that fact should have been proved to him by the oath of a credible witness, whose name must be stated.[4] And the affidavit by the person who purports to execute the instrument or by a witness not known to the notary public is not sufficient.[5] The word "instrument," as used in these sections, has been defined to mean "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty."[6]

1 Dictum in Le Mesnager v. Hamilton, 101 Cal. 532-539, 40 Am. St. Rep. 81, 35 Pac. 1054.

2 Ibid., p. 535.

3 Joost v. Craig, 131 Cal. 504-508, 82 Am. St. Rep. 374, 63 Pac. 840, distinguishing Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 Pac. 843, a peculiar case, which see.

4 Ibid.

5 Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; as to acknowledgment by partnerships, see Malloye v. Coubrough, 96 Cal. 649, 31 Pac. 622.

6 Hoag v. Howard, 55 Cal. 564.

CHAPTER XXXI

PLEADINGS

As has already been said, this work does not attempt to cover methods of procedure in the courts. Most questions of pleadings are determined in the decisions on the various matters of substantive law and rights; some other cases of interest will be noted below.

Where a corporation changes its name after the creation of the debt and before the suit is brought, the suit should be against the corporation by its new name,[1] and when a corporation is sued by a wrong name and it answers by its correct name the complaint may be amended accordingly.[2] But where two corporations had identical names, one incorporated in California and the other in New York, both doing business in this state, the body of the complaint describing the defendant as of New York, and that corporation only being served with process, the California corporation not appearing; on the case being called for trial the court had no power to allow an amendment to the complaint by striking out the word "New York" and substituting the word "California," and to proceed with the trial of the case as against the California corporation.[3]

An averment of the corporate existence of the plaintiff must be made in each count of the complaint, and likewise of the corporate existence of the defendant.[4] When a corporation is sued by its corporate name, its

1 Cumberland College v. Ish, 22 Cal. 641.

2 Mahon v. San Rafael etc. Road Co., 49 Cal. 269, 270.

3 Altpeter v. Postal etc. Cable Co., 26 Cal. App. 705, 148 Pac. 241.

4 Loup v. California So. R. Co., 63 Cal. 97; People v. Central Pac. R. Co., 83 Cal. 393, 398, 23 Pac. 303.

corporate existence is thereby admitted by the plaintiff,[5] and where the contract sued on describes the plaintiff as a corporation, no further proof of its incorporation is necessary.[6] An allegation in the complaint that the plaintiff is a corporation shows its legal capacity to sue.[7] This allegation may be denied like any other allegation, but proof of even a *de facto* existence is sufficient. The averment of the *de facto* existence may be denied.[8] Where the defendant alleges that the plaintiff was a corporation, and had never paid its license tax, and as a consequence that its charter had been forfeited and it had no capacity to sue, the answer made it unnecessary for the plaintiff to introduce a certified copy of its Articles of Incorporation, or otherwise prove that it was a corporation, and the defendant, alleging such a disability, must prove it; the fact that the license fee was not paid is not sufficient—he must also prove that the acts required of the secretary of state and the governor concerning the proclamation of forfeiture have been performed, otherwise the plea fails.[9]

A contract was signed in the corporation's name, by W., its president. "If the president had no authority to enter into the contract, it was a matter of defense"

[5] People v. Stanford, 77 Cal. 360, 364, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; Holmes v. Salamanca etc. Mill. Co., 5 Cal. App. 659, 91 Pac. 160.

[6] Fresno Canal etc. Co. v. Warner, 72 Cal. 379, 14 Pac. 37; Tustin Fruit Ass'n v. Earl Fruit Co., 6 Cal. Unrep. 37, 53 Pac. 693; Cellulose etc. Mfg. Co. v. Calhoun, 166 Cal. 513, 516, 137 Pac. 238; Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46, 56 Pac. 1026; see ante, subject, "Collateral Attack."

[7] California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

[8] Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

[9] Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567-570, 112 Pac. 454; Kaiser Land etc. Co. v. Curry, 155 Cal. 638, 654, 103 Pac. 341; Wilson v. Trainor, 27 Cal. App. 43, 148 Pac. 954.

by the corporation,[10] but where the allegation was that the plaintiff "was employed by the defendant through the secretary" and it was contended that it should have also been shown that the secretary had authority to bind the company, the court said, that this was an allegation that the employment was by the corporation, suggesting, however, that it would have been better pleading to omit all reference to the secretary.[11] An allegation that a contract was made by a corporation may be proved by showing that the contract was ratified by the corporation.[12]

The failure to allege that the corporation was duly organized as such goes to its legal capacity to sue, and not that the complaint does not state a cause of action; the former question must be raised by plea in abatement;[13] and a denial of corporate existence does not raise the issue of failure to file its Articles in the county where the land which is the subject of the action lies;[14] this fact also can be raised only by plea in abatement.[15]

Where the assignee of a note given to a corporation sues the maker to recover the amount of the same, it is not necessary to allege or prove the corporate existence of the payee;[16] the assignment, and a letter of the company to plaintiff's assignors representing that it was

10 Malone v. Crescent City etc. Co., 77 Cal. 38, 42, 18 Pac. 858.

11 Sullivan v. Grass Valley etc. M. Co., 77 Cal. 418, 421, 19 Pac. 757.

12 Blood v. La Serena etc. Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

13 Swamp etc. Land Dist. v. Feck, 60 Cal. 403; California Sav. etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

14 Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66.

15 Ibid. and Southern Pac. R. Co. v. Purcell, 77 Cal. 69, 72, 18 Pac. 886; South Yuba etc. Min. Co. v. Rosa, 80 Cal. 333, 336, 22 Pac. 222.

16 Crocker-Woolworth Nat'l Bank v. Carle, 133 Cal. 409, 411, 65 Pac. 951; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532.

a corporation, are sufficient evidence to support a finding that the defendant is a corporation.[17] A corporation is supposed to know the contracts it enters into; knowledge of such matters must rest with some of its officers, and the corporation can not assert ignorance of them; a denial on information and belief is a mere evasion.[18]

VERIFICATION OF PLEADINGS

Section 446 of the Code of Civil Procedure provides that

> Every pleading must be subscribed by the party or his attorney; . . . when a corporation is a party, the verification may be made by any officer thereof.

A corporation can not deny upon information and belief matters which are presumptively within the knowledge of any of its officers.[19] Nor is a defendant permitted to deny, on information and belief only, that a foreign corporation has complied with section 410 of the Civil Code, by filing a copy of its Articles of Incorporation, appointing an agent upon whom process may be served, etc.[20] A verification by the vice president is sufficient,[21] and so is a verification by the general manager.[22]

In a suit by a corporation upon a promissory note which it owned as assignee, a verification of the complaint by the assignor of the note, there being no show-

17 Marx v. Raley & Co., 6 Cal. App. 479, 92 Pac. 519.

18 Zany v. Rawhide etc. Min. Co., 15 Cal. App. 373, 375, 114 Pac. 1026. See "Notice," post.

19 Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 685, 32 L. R. A. 193, 44 Pac. 320; but what facts in this case were of that character does not appear.

20 Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

21 In re Close, 106 Cal. 574, 39 Pac. 1067.

22 Stockton Lumber Co. v. Blodgett, 3 Cal. App. 94, 84 Pac. 441.

ing why it was not made by an officer of the corporation, is insufficient to require the answer to be verified.[23]

There has been no decision determining whether a verification of a pleading of a corporation could be made by an attorney or other person under the same conditions as in cases of natural persons, but it would seem reasonable that this could be done. The requirement as to verification by an officer is simply "may." The preceding part of the section says the pleading "must" be verified by the party "unless," etc. Of course verification by an officer leaves no room for question.

An affidavit for attachment in a suit by a corporation which states that H. of the plaintiff corporation, being duly sworn, and signed with the name of the corporation by H., president, is sufficient. It was said a corporation can not make an oath, and that the affidavit need not be signed,[24] by the corporate name.

[23] Bittleson etc. Co. v. Howard, 28 Cal. App. —.

[24] A. P. Hotaling & Co. v. Brogan, 12 Cal. App. 500, 502, 107 Pac. 711, citing Ede v. Johnson, 15 Cal. 53, as to the latter statement, and Pope v. Kirchner, 77 Cal. 152, 19 Pac. 264, to the fact that an affidavit is made by the person signing it, notwithstanding that a different name appears at the beginning as the person making it.

CHAPTER XXXII

NOTICE TO THE CORPORATION

A mere stockholder is not an agent of the corporation, in any sense of that word. Knowledge possessed by him or imparted to him is not the knowledge of or notice, either actual or constructive, to the corporation, and the stockholder is under no duty to communicate it to the corporation. But knowledge of all of the stockholders is knowledge of the corporation.

And the knowledge of a single director, not acquired when he was officially acting for the corporation, is not the knowledge of the corporation, unless the director communicate it to the board of directors, or to an executive officer whose knowledge of it would be the knowledge of the corporation.

It is a general rule that notice to an officer or agent of a corporation is notice to the corporation if in matters in which such agent or officer would have authority to act for the corporation, or whose duty it would be to communicate it to the board of directors or to an officer who had some power or authority in the matter. Such agents or officers are conspicuously, the president of the corporation, the general manager, if it have one, the secretary, and a bank cashier.

There are many special circumstances making communications to even such agents not notice to the corporation, such as professional confidences, or where it is certain the agent will conceal it, or where there is collusion by the party communicating it with the agent. The cases on this subject are in vast number, and no attempt will be made, as in no other matter, to notice

specially any but the California cases peculiar to corporations.

Our supreme court has said: "The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears or understanding, save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption."[1] And again, "as a corporation can have knowledge only through the information of its officers and agents, the knowledge of such officers within the scope of their duties and employment becomes the knowledge of the corporation,"[2] and this rule was held applicable to a secretary who failed to communicate the condition upon which certain non-negotiable paper was made.[3] Where the directors, or the president and secretary, had knowledge that a commission was to be paid when the mortgage was executed, the corporation is chargeable with the knowledge; whether all the shareholders knew of it is immaterial.[4]

It has been decided that notice to the secretary, who was also the bookkeeper and a director of a corporation, that a note had been assigned was notice to the corporation, and a corporation was charged with knowledge of facts within the knowledge of its president while he was acting as attorney in fact for a

1 Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 397. This language was quoted with approval in Fresno Street R. Co. v. Southern Pac. R. Co., 135 Cal. 202-208, 67 Pac. 773.

2 Montecito etc. Water Co. v. Santa Barbara, 144 Cal. 578-597, 77 Pac. 1113.

3 Jefferson v. Hewitt, 103 Cal. 624-629, 37 Pac. 638.

4 Blood v. La Serena Land etc. Co., 134 Cal. 361-370, 66 Pac. 317.

person making an assignment to it.[5] And knowledge of the president of a street railroad company, where its rights are being encroached on by a railroad, is knowledge of the corporation.[6]

A corporation can not deny knowledge of facts which are presumptively within its knowledge, although the officer verifying the pleading had no knowledge of them.[7] If a director individually contracts for certain work to be done on the property of the corporation, the corporation is not held to have notice by the fact alone that the work is being done, so as to make it responsible for its cost;[8] this was a case where a director was acting not for the corporation but in his own behalf, in a sense adverse, when notice to him or his knowledge is not imputed to the corporation.

The officers and the corporation are charged with notice of the facts appearing on the books of the corporation, such as the fact that a person holds certain shares of stock as trustee, or the execution of a note.[9]

[5] Love v. Anchor etc. Vineyard Co., 5 Cal. Unrep. 425, 45 Pac. 1044; Witter v. McCarthy Co., 5 Cal. Unrep. 267, 43 Pac. 969.

[6] Fresno St. R. Co. v. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773.

[7] Sloane v. Southern Cal. Ry. Co., 111 Cal. 668-685, 32 L. R. A. 193, 44 Pac. 320. What facts the corporation was conclusively presumed to know did not appear in this case; Zany v. Rawhide etc. Min. Co., 15 Cal. App. 373, 375, 114 Pac. 1026.

[8] Ayers v. Green G. M. Co., 116 Cal. 333, 48 Pac. 221.

[9] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Curtin v. Salmon River etc. Ditch Co., 141 Cal. 308, 311, 99 Am. St. Rep. 75, 74 Pac. 851.

CHAPTER XXXIII

PROMOTERS

The term promoter can not be satisfactorily defined, for the reason that the relations which persons who have been declared to be promoters bear to the corporation are of so infinite variety that they can hardly be enumerated, much less can they be described in a few words which would not include too much or too little. It has been said to be more of a business than a legal term and that a promoter is an organizer of business operations, familiar to the commercial world, by which a company is brought into existence. The term is quite as well understood by laymen as by lawyers. The fact is also beginning to be realized that, by the very nature of his business, he is to make a profit out of the organization of the company. The earlier cases, indeed almost all cases down to the present time, called him a trustee and said that he occupied a fiduciary relation to the proposed stockholders, as though he were performing some function for the proposed stockholders which they had conferred upon or entrusted to him. The real relation is usually nothing of the kind. In every sense of the word he is an outsider dealing with them, not for them. They know he will, or expects to, make a large profit; the nature of his business puts them on their guard in that respect. It is a case, if there should be any, where the rule of *caveat emptor* should apply. The persons who are to become the incorporators have the same ambitions to make large, and what is called easy, money as the promoter. They welcome his advent, and usually he is able to compose differences between the capitalists going into the enterprise which they never would be able to do themselves.

For a long time, and even now, the courts regarded him with some suspicion and his status before the law was one more of sufferance than of right. But industrial progress demands his help, and he has become a permanent factor in discovering opportunities and organizing forces to put useful and profitable enterprises on their feet, and this often requires an intelligence and judgment of a high order.

The best statement of his duties and liabilities, we think, is:[1] First, he can not sell property obtained by him merely on option for the purposes of the corporation, and make secret profits; but if he purchased the property before he began promoting the company he may sell it to the company without disclosing his profit. Even then, if he makes any statements in regard to its cost they must be true; nor may he conceal from them the fact that he owns it. Second, the promoter can not receive a commission or bonus from the person who sells the property to the corporation, whether that commission be in cash or shares of the stock of the corporation.

Under the doctrine that the promoter occupies a fiduciary relation towards the corporation, if he violates either of the general rules above, the corporation may elect to rescind the purchase if it was made from him, or to recover from him his secret profits. The profits, if any, must be secret, otherwise there is no cause of complaint. And he is liable for such profits, although the property is worth all the corporation paid for it. If he induces a person to subscribe by false representations in these respects, the subscriber may recover his damage from him, although other subscribers knew all the facts concerning the transaction. And, it has been said in some cases, a promoter may be liable to parties whom he induces to sell their property

1 Deduced from Cook on Corporations, section 651.

to the corporation, if they take securities of the corporation in payment and he conceals all or a part of his profits.

No attempt will be made to cover all cases where promoters have been held liable; that subject would fill a volume in itself. But substantially all of the cases fall within the two classes above mentioned.

In England the requirements of a statute, and the rules of the law, are met by a statement in the prospectus that the promoters are making a profit in the transaction, without stating the amount. If the subscribers are willing to come in under such circumstances they are like one of two parties to any transaction of purchase and sale; they can not afterward complain of the amount of profits. The corporation, by its experts, always examines the property and forms its own opinion as to its value and acts accordingly. If, however, the promoter controls the corporation, if it is already in existence, the rule is different; but not if he is simply inducing persons to form the corporation, for there they are free to act upon their own inclination or judgment.

The promoter, by comparison with those who finance the enterprise, is usually a person of limited means; and capital, being excessively jealous of profits which go elsewhere, has been greatly benefited by these decisions; the decisions often enable capital, by pretending to shut its eyes, to take Naboth's vineyard also.

The first case[2] in this state which considered promotion from the point of view of the promoter's duties and liabilities to the corporation, and to the stockholders coming into it, was one where the promoters were an important portion of the proposed, and later actual, stockholders of the corporation. The parties

2 Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

who later were the promoters of the corporation bought land at an administrator's sale for five dollars per acre and represented to the others whom they induced to join them in forming the corporation that it cost them twenty-five dollars per acre, and that all stockholders were to come in on the "ground floor," and the land was turned over to the corporation at that increased price. The corporation paid in cash a sum slightly exceeding five dollars an acre, and gave a mortgage on the land for the balance. When the actual facts were discovered, the other stockholders having secured control of the management of the corporation, the corporation brought suit to cancel the mortgage and a sale under its foreclosure. The court says that even if the parties sustained no fiduciary relation to the corporation (not yet formed, or considered with the other parties) or to the other stockholders at the time they purchased the land, "they afterwards placed themselves in a fiduciary relation to the corporation by promoting it, and while in that relation, by means of the fraudulent representations and concealments, induced the corporation to purchase their land, whereby they made 'secret profits' exceeding seventy-five thousand dollars." The court quotes with approval,[8] "the subscriptions of the shareholders are made upon the trust that the promoters are men of rectitude and business sagacity, who will use their knowledge and exercise their control over the enterprise for the benefit of the company. Justice demands that the promoters of a company should not abuse the confidence placed in them by the subscribers for shares, or derive any unjust advantage through their control over the organization or management of the company. Accordingly, it has been held that if persons start a company, and induce others to subscribe for shares for the purpose

[8] Morawitz on Corporations, sections 545, 546.

of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts or suppression of truth in relation to the character and value of the property or their personal interest in the proposed sale, the company will be entitled to set aside the transaction, or recover compensation for any loss which it has suffered."

The promoters themselves subscribed four-ninths of the capital stock, so that in any event they could realize but little more than one-half of the possible increase in the price of the land. It does not appear that there was any allegation or any finding that the land was not worth the sum agreed to be paid, although at a foreclosure sale (which this judgment set aside) it was bought in by the mortgagee at a price which left a deficiency of about thirteen dollars an acre; it is, however, well recognized that property seldom brings a fair price at forced sales. Nor does the court, in its opinion, take any notice whatever of the value of the land. Three of the complaining stockholders resided at San Diego where the land was situated and the other three at Los Angeles, which is not far distant, and there appears no claim that they did not know the property or know its value, or that they relied on the promoters' judgment of its value, but the statement is made that they believed all the false representations as to the price at which the promoters bought the land and that there was concealed from some only of the complaining stockholders that some of the promoters were interested in the land. The only reprehensible act appearing is the statement by the promoters that they paid very much more for the land than was true. But if every transaction in which such an untrue state-

ment is made were set aside, a large part of all commercial transactions would fall.

This case rests on the sole ground that the promoters bought a tract of land at a price, and thereupon organized a corporation of whose capital they subscribed nearly one-half to which they sold it at a much larger price, and concealed, worse, made false statements of how much the property had cost them. But in the absence of the appearance of any allegation or finding that it was not worth the larger sum, it must be presumed that it was. The doctrine then established by this case is that capital coming into a corporation is entitled not only to all the profits of the enterprise undertaken, but to all profits created or realized by the skill, ability, or good fortune of those who organize it in respect to the property dealt in. Disclosing those profits could make no possible difference unless the jealousy of profits realized by any other person would be sufficient reason for the rejection of a proposition otherwise desirable.

It was held that the mortgage in this case should be cancelled (it being almost but not quite equal to the so-called "secret profits") and that the corporation need not rescind the contract but might retain the land, as the cash paid by the corporation was slightly in excess of what the land cost the promoters.

The next case[4] presents a somewhat different state of facts. Real estate brokers, after securing contracts for the purchase of sundry lands, conceived a plan of organizing a corporation to take over these tracts, which was to make the remaining payments of the purchase price thereof, and to secure other tracts of land. The court departs from some of the principles underlying Ex-Mission v. Flash, *supra,* for they say, as to the tracts purchased before the plan of the corporation

[4] Burbank v. Dennis, 101 Cal. 90-101, 35 Pac. 444.

was entered upon, that the promoter, "being the owner of these tracts prior to the commencement of confidential relations with the complainants, had the right to dispose of his property to the corporation at any price he saw fit to ask and the corporation saw fit to pay" . . . "The question of disclosure or concealment of information which should have been communicated is not here involved. It is a question purely of false representations as to a substantial matter" and that at a time when the promoters were the owners of several tracts of land they "became the promoters of the defendant corporation and sold this property to the corporation, and at such sale represented that it was being sold at its original cost to them. The representation was false." The cases are otherwise substantially identical except nothing is here said as to the duty to disclose "secret profits," save the inference above that this was not necessary as to the first tracts mentioned. In the former case the basis of the right of recovery is repeatedly stated to be the "concealment" of the actual price paid and of the consequent "profits," rather than false representations; the false representations being referred to as the means by which the profits were concealed.

The court below, in this case, found that the promoters "represented to and promised and agreed with each and all of the persons above mentioned that all of such lands as they then had or might thereafter acquire should be put in and conveyed to such proposed corporation at the same price and consideration as the said [promoters] had paid or agreed to pay therefor to the party or parties from whom they then had or might thereafter obtain the same," which finding the court says was sustained by the evidence.

There was also a written instrument executed by the principal promoter, in whose name the contracts of

purchase of the lands had been made that "the subscribers of stock of said corporation are the real purchasers of said lands" and as soon as the corporation was organized, agreed to transfer all his interests to the corporation. This agreement is ample and solid foundation for the judgment, without going into obscure questions whether certain representations were necessary, and if false, whether they were at all material, for representations no matter how false must be material.

The court further said, the knowledge of the directors as to the price paid was not the knowledge of, or conclusive upon the stockholders, and gave judgment against the promoters for the excess of the amount charged the corporation over the price paid by the promoters.

Soon thereafter another case[5] came up where promoters made a contract to purchase property and thereupon organized a corporation to take it over at the sum of $72,000, of which $36,000 was to go to the original owner of the property and $36,000 to the promoters, which agreement was kept secret from the stockholders. Stock of the corporation was sold to raise this money and to improve the property. The promoters represented to the stockholders whom they induced to come in that they, the promoters, were the owners of the property and that its value was $72,000. (It does not appear that anything was said as to what they paid for it.) The value of the property was only $36,000. When $10,000 was raised that sum was paid on the purchase price, and the land was then deeded to the corporation which gave mortgages back to the original owner of the property for $62,000, the balance of the purchase money. Default having occurred in the

[5] Buena Vista Fruit etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386.

payment of the mortgages, one of them was foreclosed and the property was bought in at the foreclosure sale by the original owner of the property for $32,300. The stockholders brought a suit, alleging the foregoing facts as grounds, to set aside the foreclosure sale and to have the notes and mortgage cancelled.

But they were met by a demurrer, and the supreme court said that they were asking equity without offering to do equity; that they had received property admitted to be worth $36,000, on which they had paid only $10,000, without offering to return the property or to pay its value, and asking that the purchase money notes and mortgages be cancelled; in other words, claiming the transaction was tainted with fraud, and that they were entitled to its benefits but could repudiate its burdens. The court said that could not be done, and affirmed the judgment on demurrer in favor of the defendants.

Another unsuccessful attempt to charge persons as promoters, and therefore to set aside the transaction, is really not of great importance, or interest, as no facts were established that brought the case within the rules established anywhere for charging a promoter with dereliction of duty or improper profits.

There was, however, one point of some importance decided, without reference to a contrary statement in the Burbank case. The court says: "Whether all the shareholders knew of the commission paid to Blood is immaterial. If the directors had knowledge at the time the mortgage was authorized by them, or if the president and secretary of the corporation had such knowledge when they executed the mortgage, the corporation is chargeable with the knowledge."[6]

[6] Blood v. La Serena Land etc. Co., 134 Cal. 361-370, 66 Pac. 317.

In another case,[7] and the concluding one of the decisions of our courts on this branch of the subject, the stockholders were successful.

A party, whom we will call the first option party, had an option to purchase a certain property at $27,500. Another person, whom we will call the first promoter, conceived the idea that the tract was desirable for the use of a "gun club" as a "duck preserve." He secured an option from the first option party at $33,000, which was to give the first option party a profit of $2500 and the first promoter $3000 as commissions for securing a purchaser.

The first promoter associated other promoters with him and made a written proposition to the proposed "gun club" in which the statement was made that the first option party had an option to purchase the property (price not stated) and that it was proposed to organize a "gun club corporation" and to secure this land at the price of $39,500, of which $14,500 was to be cash, and the further sum of $7000 to be paid in installments, the balance, $18,000, being contained in a mortgage on the property, payment of which was assumed.

When the cash payment of $14,500 was made, the first option party who received the same gave a receipt for that amount and paid $3000 to the first promoter as his commissions on the sale, turned over $6500 to the associates of the first promoter, and retained $2500 as his profit in the transaction. Later the club made a further payment of $5490 (leaving about $2000 of the cash unpaid) and made no other payments except of installments of principal and interest on the $18,000 mortgage.

The organization of the club was contingent on securing thirty-six subscribers, which evidently was a slow

7 Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 18 L. R. A. (N. S.) 1106, 97 Pac. 10.

process, for it became necessary to secure an extension of the time of the option, and finally for the first option party (which was his first and only connection with the corporation) to subscribe for one share, and for the first promoter to do likewise. Four of the subscribers knew the promoters were making some money by the transaction, but did not know how much; none of the other subscribers knew how much the first option party was to pay for the property, nor what, if anything, the promoters were to get out of the $39,500 the club was to pay for the property.

The court said as to the first option party, who had no connection with the corporation except as a subscriber, the other subscribers knowing he was making some profit, that "the mere fact that they did not know the amount will not entitle them to complain, in the absence of some misrepresentation in the matter," and hence that his $2500 profit should not be included in the amount of recovery, but held him liable for all the rest, although he received none of it, because he aided the others to carry out their scheme by signing the above receipt for $14,500, thus becoming a joint tort-feasor. The first promoter who was to receive the $3000 from the first option party as commission for finding a purchaser for the property, because he induced two persons to become subscribers to the stock of the gun corporation, became thus a promoter, which made him one of the joint tort-feasors, and he also was responsible for the entire sum. The associate promoters, who received the $6500, and who were the principal ones who secured the subscribers to the stock of the gun corporation, were, of course, also joint tort-feasors and responsible likewise for the entire sum.

It does not appear that the subscribers ever made any inquiries as to what, if anything, the promoters were to get for their professional skill in finding and

securing so valuable and desirable a property; nor what, if any, consideration they were to receive for the knowledge and skill and two months' arduous labor required to get together so many persons able and willing to spend money so freely in manly sports; nor does it appear that anything was ever said to them on that subject. Nor does it appear that the property was not well worth the sum agreed to be paid for it. Evidently they were pleased with the property and satisfied with the price.

When all the details of the profits were made known, still they did not desire to rescind the purchase and receive back their money. On the contrary, they preferred to keep the property, whatever might be the result of an effort to get back the compensation or profit of the promoters, therefore they brought their speculative suit.

The next case[8] presented the question, new in this state, where the secret profits of the president and director arose out of a contract which was entered into by the corporation with third parties before the defendant became such president and director. Upon his election the president went to the contractors with the corporation, and demanded and obtained from them an interest in the profits they might make in selling the stock, which arrangement was kept secret from the other directors and the corporation. The court said that the president and directors were under obligation (Civil Code, section 414, of the insurance law) to secure subscriptions to the full amount of the fixed capital; that in this capacity they were really *promoters* of the corporation, and should be held to all the obligations of promoters; that in such a case many questions might arise between the corporation and the contractors

[8] Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

which the president acting for the corporation could decide, and his interest with the contractors was incompatible with his trust relation to the corporation in making such decisions; and held that his interest in the contract was a fraud upon the corporation, and that he was liable to it for all the profits so secretly made by him, even if the corporation suffered no damage thereby.

The latest declaration[9] of our court on this subject goes to the very extreme of any of the cases which establish a trust relation between the promoter and a beneficiary not yet *in esse*. The primary promoter, having an option on a property at a price, represented to his proposed associates (who thereupon became promoters with him) in the proposed enterprise that the lowest price for which he could obtain the property was a sum over double the real price to be paid, and recommended the purchase. It was agreed that a corporation should be organized to make the purchase; that all of its stock should be issued to the promoter for one-half of the property; that three promissory notes to the amount of $300,000 be delivered to the promoter for a deed to the other half; that the promoter should transfer to the treasury of the corporation three-fifths of the stock to be used by it for its corporate purposes, which included the sale of sufficient stock to raise the money necessary to pay said promissory notes; and that the remaining shares (two-fifths) be distributed in a certain manner between the promoter and his associate promoters. This arrangement was carried out. Sufficient money was raised by the sale of treasury stock to pay two of the promissory notes. The primary promoter became, and continued for some time, the president and in control of the corporation. Thereafter his associates obtained control of the corporation, and also discovered

[9] California etc. Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595.

that the amount of the promissory notes was double the price paid for the property by the primary promoter. That the primary promoter was guilty of a fraud upon his associate promoters is clear, and was not disputed in the action; but the suit was not by the associate promoters against the primary promoter to recover their proportion of the secret profits made by him, but was by the corporation (at the instance of the associate promoters) to cancel the remaining unpaid promissory note. To maintain the suit it was necessary to declare, not simply that there was a fiduciary relation between the primary promoter and his associate promoters, but that such a relation existed between the primary promoter and parties not then in existence, that is, all persons thereafter purchasing stock from the corporation. This the court did, affirming the judgment cancelling the note. An attempt was made to distinguish the case from cases cited and from a very late decision[10] by the supreme court of the United States, in which all the justices of that court concurred, saying that they were all, or principally, cases where, aside from the promoters, "there were no other stockholders . . . nor was it contemplated that others should become future purchasers from the corporation of its stock," and that the promoters sold more or less of their stock to outsiders, and that the corporation brought the suit in behalf of such purchasers. A careful perusal of the Old Dominion case shows that the above statement of it is not correct, that it was contemplated that shares should be sold to the public, and that they were so sold, and even that one of the promoters had taken an advantage of another promoter and that the corporation's rights, whatever they may be, were identical with this case. Bigelow and Lewisohn received all of the stock issued in exchange for the prop-

10 Old Dominion etc. Smelting Co. v. Lewisohn, 210 U. S. 206, 52 L. Ed. 1025, 28 Sup. Ct. 634.

erty, and distributed it among their associates (it was also claimed that they got some profits unknown to their associates which the court said was immaterial to the corporation); that on the organization of the corporation it was contemplated that shares should be sold to the public; that $500,000 of the treasury stock (not the promoter's, as stated by our court) was sold to the public. The United States supreme court says that at the time of the sale to the corporation Bigelow et al. were on both sides of the bargain (as here Manson) and might issue as much stock to themselves as they liked for the property and that "no wrong was done to any one"; that "if there was a wrong it was when the innocent public subscribed." The court says it must be claimed that the agreement was not made merely as the corporation then was (with only 40 shares subscribed), but to bind it when all of its capital should be taken, with the implication that it then was practically a new and different corporation; that the corporation got a new right from the fact that new men who did not know what it had done had come in; that while the new members had no ground for suit in their own names their advent changed the position of the corporation; that the indirect effect was greater than the direct effect; that facts which gave them no claim gave the corporation one notwithstanding its assent, and if it is to be so, the guilty stockholders will profit with the innocent. The court says "it is difficult, without inventing new doctrines or qualifying established doctrines, to go behind the fact that the corporation remains one and the same after it once really exists" and very significantly suggests that "it is competent for legislators but not, we think, for judges, except by a quasi-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind," and says that whatever other rights of action exist, the corporation has none.

There are occasional cases where the promoter is the actual representative or agent of those who form the corporation, but they are rare. One is impressed with the belief that the decisions of courts on this subject, in order to save weak-minded or voracious opulence, have often accomplished as great wrongs as those charged to the promoters.

PROMOTERS NOT THE CORPORATION

Speaking of promoters organizing a corporation, and conveying certain property to it in consideration of the issuance to them of a part or all of the stock of the corporation, notwithstanding the promoters constitute all the stockholders and directors at that time, the court says: "The promoters are not the corporation, and their contracts can not be its contracts. . . . After it comes into existence and operation it may, by adopting arrangements thus made for it in advance, make them its contract, precisely as it might make similar contracts had no previous engagements been entered into."[11]

PROMOTERS' CONTRACTS—ASSIGNMENT

If a corporation is organized by persons having a franchise to operate a railroad, for the purpose of taking over and operating it under the franchise, and it does so, no formal assignment of the franchise to the corporation is necessary to vest its right to the franchise.[12] But contracts made by the promoters prior to the organization of the corporation, intended to be and actually beneficial to the proposed corporation, will not bind the corporation even if approved by two of the three directors, there being no formal action of the

11 Scadden Flat etc. Min. Co. v. Scadden, 121 Cal. 33, 38; Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834.

12 Santa Rosa etc. R. Co. v. Central St. R. Co., 4 Cal. Unrep. 950, 38 Pac. 986.

board thereon.[13] But where a corporation accepts a deed to land, a contract for which had been made prior to its organization with its promoter, it will be held personally bound for the stipulated payments, although it never expressly agreed to make such payments.[14]

[13] Rideout v. National Homestead Ass'n, 14 Cal. App. 349, 112 Pac. 192.

[14] Jones v. Allert, 161 Cal. 234, 118 Pac. 794.

CHAPTER XXXIV

FOREIGN CORPORATIONS

INTERNAL AFFAIRS OF, NOT SUBJECT TO CONTROL OF THIS STATE

As a general statement, it is undisputed that a state has no jurisdiction through its courts over the internal affairs of a foreign corporation which it permits to do business in the state; nor may it do so through its legislature.[1] A good expression of this rule made by one court is that, courts possess no visitorial power over them, and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, or by-laws; such powers belong only to the state which created the corporation. Our own supreme court has said, "over the organization and internal government of foreign corporations it has no such powers. The laws of the state do not have extra-territorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations."[2]

But this doctrine is constantly being encroached upon in cases where the court obtains jurisdiction over the corporation, or its officers, and is able to hear and determine the matter and to enforce its decree, as will be observed by consultation of the many cases cited in general works on this subject. While not disputing the general rule, our own courts, in a "hard case,"

1 Thompson on Corporations, section 1641, and cases, from all parts of the country, cited.

2 Miles v. Woodward, 115 Cal. 308, 311, 46 Pac. 1076.

pretty nearly demolished it.[3] And the supreme court of the United States held that a statute of this state (now repealed) requiring the consent of two-thirds of the stockholders of a mining corporation to a conveyance of its mining ground located in this state, was applicable to a foreign corporation, saying, in effect, that this was only a regulation of its business transactions and not of the internal affairs of the corporation.[4]

CONDITIONS OF DOING BUSINESS

Article 12, section 15, of the constitution is as follows:

> No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.

[3] Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 Pac. 677, s. c. 14 Cal. App. 674, 113 Pac. 126, 130.

[4] Williams v. Gaylord, 186 U. S. 157, 46 L. Ed. 1102, 1106. But if this may be done as to the conveyance of real estate, similar or different regulations may be made as to all kinds of property, and a business corporation can do practically no business which does not affect property in some manner. While the decision was largely based on those of the California supreme court declaring that the statute was applicable to foreign corporations, yet, if it were not so by its very terms, the court declared that the legislature had the power to make such a law. The consequence of this decision is to wrench the whole charter to pieces; for, that instrument or the laws of the state under which it is incorporated, giving general or special powers to its directors, or to certain officers, no foreign law or court may lodge that power in any one else. Would it be contended that the foreign state could confer certain, or all, powers upon certain officers, or upon all the stockholders, or upon a certain proportion or class of them, if the laws of the state where the corporation was incorporated, or its charter, expressly prohibited such a thing? Yet that is the incredible result of this decision; it is not simply making certain deductions from given premises, but is an example of that discredited method of reasoning which "transcends all human experience."

This section of the constitution was held to require foreign banking corporations to publish and file statements of their conditions the same as is required of domestic banking corporations,[5] and it was said that the act of 1880 imposing certain penalties on directors of corporations as to keeping books, posting statements and sundry other matters, is not unconstitutional because it is not made expressly applicable to foreign corporations also, for the reason that "the law is designed to protect stockholders of domestic corporations . . . the conduct of whose internal affairs are subject to the control of the legislature. It does not, therefore, relate to the business of the corporation, nor impose burdens or restrictions upon domestic corporations in the conduct of their business from which foreign corporations are relieved."[6] It was held that the acts of 1872, p. 826, and of 1899, p. 111, in regard to classification, do not permit foreign corporations to do business in more favorable terms than domestic corporations.[7]

The phrase "to transact business," as used in this section of the constitution, is equivalent to the words "to do business," and even if a foreign corporation comes within the purview of this section of the constitution by the doing of a single act of business, such act must be one of the ordinary business acts of the corporation and not one merely incidental to the main purposes of its incorporation, such as the sale of real property belonging to a religious corporation.[8] It is intimated, but not decided, in this case that this pro-

[5] Bank of British North America v. Alaska etc. Co., 97 Cal. 28, 31 Pac. 726; Bank of British North America v. Madison, 99 Cal. 125, 33 Pac. 762.

[6] Miles v. Woodward, 115 Cal. 308, 311, 46 Pac. 1076.

[7] Anglo-Californian Bank v. Field, 146 Cal. 644, 650, 80 Pac. 1080.

[8] General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411.

vision of the constitution is not self-executing; but the liability of stockholders for the debts of a foreign corporation doing business in this state has been expressly declared by statute in Civil Code, section 322. A distinction is also drawn between the purposes of a corporation and its powers. Many of its powers are incidental, such as the right to maintain suits, etc., and exercising such powers is not doing business within the meaning of this law.

Stockholders of a foreign corporation, whose charter provided that all or a part of its business shall be done in California, are liable for all the debts of the corporation contracted in the business done by it in this state.[9]

PLACE OF ORGANIZATION

The fact that the organization meeting of the corporation was held in California, and not in the state of its creation, can not be raised collaterally; such inquiry can be made only in the state of its organization.[10]

DESIGNATION OF PERSON TO BE SERVED WITH PROCESS

Section 405 of the Civil Code is as follows:

> § 405. Every corporation other than those created by or under the laws of this state must, at the time of filing the certified copy of its Articles of Incorporation, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served.

[9] Pinney v. Nelson, 183 U. S. 144, 46 L. Ed. 125, 22 Sup. Ct. 52; Peck v. Noee, 154 Cal. 351, 97 Pac. 865; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 139 Am. St. Rep. 120, 110 Pac. 942; s. c. 16 Cal. App. 403, 414, 117 Pac. 1041, 1046; Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577, 34 Sup. Ct. 312. See "Stockholder's Liabilities," ante.

[10] McKee v. Title Ins. etc. Co., 159 Cal. 206, 113 Pac. 140.

A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment.

Such process may be served on the person so designated,

Or, in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such corporation. (Amended, Stats. 1907, p. 558.)

A foreign corporation is not required to appoint an agent upon whom service of process may be made until it files its Articles of Incorporation with the secretary of state, and until its Articles are so filed service of process upon the secretary of state is void.[11]

IF NO PERSON DESIGNATED

If no person upon whom service of process may be made, according to the provisions of this section, is designated by a foreign corporation, service may be made on the managing or business agent under section 411 of the Code of Civil Procedure,[12] or upon the secretary of state as provided in this section; but service can not be made on the secretary of state if a person is designated upon whom service may be made.[13] Also publication of notice may be made on corporations organized outside of the state, under the Code of Civil Procedure, the same as on other absent defendants.

NOT DOING BUSINESS, SERVICE ON SECRETARY OF STATE VOID

If a foreign corporation is not doing business in the state (or has not for over a year) service of summons on it can not be made on the secretary of state; such

11 Winston v. Idaho etc. Co., 23 Cal. App. 211, 137 Pac. 601.

12 Thomas v. Placerville etc. M. Co., 65 Cal. 600, 601, 4 Pac. 641.

13 Willey v. Benedict Co., 145 Cal. 601-604, 79 Pac. 270.

service and the judgment founded upon it are void,[14] and six months and one day after the entry of the judgment is a reasonable time within which to make a motion to vacate the judgment. The burden is on the plaintiff to show that a foreign corporation is doing business in the state, and, if it does not do business in the state, it is beyond the reach of our courts, and doing a single act of business is not "doing business," within the meaning of section 411 of the Code of Civil Procedure.[15]

"To transact business" has the same meaning as "to do business." Whether a single act will constitute "doing business" or not, the sale of real estate owned by a corporation not organized for profit is not such doing business within the meaning of this constitutional provision, and it was not necessary for such a corporation to first obtain an order of court under section 598 of the Civil Code authorizing it to sell its real estate.[16]

SERVICE OF MANAGING AGENT

If the affidavit of service of summons states that it was served upon H., "the president and managing agent within the state of California, of said corporation," on January 13, 1906, and the counter affidavit of H., made on January 20th, states that he is not such

[14] George Frank Co. v. Leopold etc. Co., 13 Cal. App. 59, 108 Pac. 878.

[15] Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289. See this case for an interesting discussion of these questions, Herron Co. v. Westside etc. Co., 18 Cal. App. 778, 780, 124 Pac. 455. See another interesting case declaring that certain acts constitute "doing business" in the state, and the further fact that it was interstate commerce did not make the corporation immune from service of process upon one of its agents, International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. 853.

[16] General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411.

officer or agent the latter is insufficient, for he may have been such agent on January 13th, and if in a subsequent affidavit H. swears he never was such officer or agent, the finding of the trial court that he was will not be disturbed on appeal, there being a substantial conflict of evidence.[17]

But where it is sought to set aside the service of a summons on the managing agent on the ground that the foreign corporation was not doing business in the state, notwithstanding the affidavit in support of the motion sets forth such fact fully, if that is not expressly made one of the grounds in the motion to set aside the service that ground is waived.[18]

RETURN OF SERVICE MUST SHOW, WHAT

And it is held that a sheriff's return of service upon the secretary of state does not show a legal service of summons upon a foreign corporation, if it does not also show that no person has been designated by the corporation under this section upon whom service of process may be made. A certificate by the secretary of state, attached to the summons, that the corporation had not designated any person upon whom service might be made did not aid the sheriff's return, for such a certificate is not provided for by the statute.[19]

IF SERVED ON SECRETARY OF STATE CONSTRUCTIVE, NOT PERSONAL

In the case of service of summons upon a foreign corporation which had designated no person for that purpose, by service upon the secretary of state, the court said that such service was constructive and not

17 Dickinson v. Zubiate M. Co., 11 Cal. App. 656, 662, 106 Pac. 123.

18 Ibid.

19 Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

personal, and that, under section 473 of the Code of Civil Procedure, the corporation could move within one year after the rendition of the judgment to set it aside on the ground that it had not been personally served, and in allowing the motion that the court was without discretion in the premises.[20] The court further said, the corporation being engaged in carrying on business in the state must be deemed to have consented that service could be made upon the secretary of state, but that did not make the service personal; any other service than upon its agent designated for that purpose or upon an officer as provided in section 411 of the Code of Civil Procedure must be regarded as constructive.

It was objected that the law permitting service of process on the corporation by service on the secretary of state in such a case is unconstitutional, because the state has no power to appoint an agent for a person beyond its jurisdiction, and that the law does not require the secretary of state to notify the corporation of such service, and that a judgment upon such service would be without notice to or opportunity for the corporation to be heard, and would be taking its property without due process of law. It must be admitted that this is a powerful assault upon the legality of that statute. But the court said[21] that a corporation doing business in this state is bound to know the law and is presumed to assent thereto, and therefore there is nothing unjust or unconstitutional in the law. It would seem that such suits must be confined to things connected with the business so done in this state. The court also said this manner of service is a substitute for service by publication on non-resident defendants. The query then arises, can no personal judgment be rendered upon such service? This manner of service

20 Holiness Church v. Metropolitan Church Ass'n, 12 Cal. App. 445, 107 Pac. 633.

21 Olender v. Crystalline M. Co., 149 Cal. 482, 86 Pac. 1082.

does not purport to be exclusive; it would seem to be alternative rather than a substitute, and certainly personal judgments were contemplated where the corporation is doing business in this state. The court said further that an averment that the corporation was still doing business in the state at the time of filing the complaint was not necessary; this seems to be going far.

OBJECTION MUST BE TIMELY

And it is too late, after the trial and submission of a case, to ask leave to file a plea in abatement on the ground that the plaintiff, a foreign corporation, had not filed a designation of some person residing in the state upon whom service could be made; such delay may be taken as a waiver of the disability, and the refusal of the court to grant such leave was a proper exercise of discretion with which the appellate court will not interfere.[22]

It is not necessary, ordinarily, to allege the state under which a corporation is incorporated; it is enough to allege that it is a corporation. If the complaint states the defendant is a corporation organized under the laws of New York, and the defendant admits it is a corporation but denies that it was incorporated in New York, the answer admits sufficient to sustain the judgment.[23] But if questions of limitation, right to bring suit, venue, etc., arise, the fact that it is a non-resident corporation may be very material.

RIGHT TO BENEFIT OF STATUTE OF LIMITATIONS

Section 406 of the Civil Code is as follows:

> **§ 406.** Every corporation which complies with the provisions of this chapter is thereafter entitled to the

[22] Reed & Co. v. Harshall, 12 Cal. App. 697-703, 108 Pac. 719.

[23] Waldeck & Co. v. Pacific Coast etc. Co., 2 Cal. App. 167, 83 Pac. 158.

benefit of the laws of this state limiting the time for the commencement of civil actions,

But no corporation not created by or under the laws of this state is entitled to the benefit thereof, nor can any such corporation maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section.

In any action or proceeding instituted against any body styled as a corporation, but not created by nor under the laws of this state, evidence that such body has acted as a corporation, or employed methods usually employed by corporations, must be received by the court for the purpose of proving the existence of such corporation, the sufficiency of such evidence to be determined by the court with like effect as in other cases.

Every corporation which has complied with the laws then in force, requiring it to make and file a designation of the person upon whom process against it may be served, need not make or file any further designation.

Any designation heretofore or hereafter made may be revoked by the filing by the corporation with the secretary of state of a writing stating such revocation.

Within forty days after the death or removal from the state of any person designated by the corporation, or after the revocation of the designation, the corporation must make a new designation, or be subject to the provisions and penalties of this chapter. (Enacted March 21, 1905; Stats. 1905, p. 630.)

IF ARTICLES ARE NOT FILED

If the foreign corporation has not filed its Articles with the secretary of state, not only is it not required to designate an agent upon whom service of process may be served, as we have seen, nor does the denial of the right to defend an action contained in this section apply to a corporation in such circumstances, but it is

subject to a fine.[24] A very fine distinction is drawn between the meanings of the varying phraseology of these sections, which can be best understood only by reading the decisions *in extenso*. It was quite justly said that to deny the right to defend would be unconstitutional.

NO BAR TO SUIT IF AGENT FOR SERVICE IS NOT APPOINTED

Foreign corporations, being citizens of another state, can do business in this state only by comity, and hence can transact business in this state only by virtue of the laws as they exist. So long as they remain out of the state, they can not avail themselves of the statute of limitations, the above section expressly withholding the privilege of pleading that statute until it files its Articles and designates a person upon whom service of process can be made. It is said this statute is really not a limitation on the right but confers it only upon a condition.[25]

PROOF OF APPOINTMENT OF AGENT NECESSARY

It is necessary not only to allege that the corporation has appointed such an agent, but to prove it; in the absence of proof a finding by the court that no such appointment had been made is not only justified but required. As foreign corporations are residents and citizens only of the state which creates them, they come within the principle of those statutes which make an exception as to absent debtors, in favor of whom, so

24 Winston v. Idaho etc. Co., 23 Cal. App. 211, 137 Pac. 601; American etc. Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15. See Civil Code, section 410, infra.

25 Pierce v. Southern Pacific Co., 120 Cal. 156-163, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302.

long as they remain without the jurisdiction of the state, the statute of limitations does not run.[26]

BUT QUERE IF MANAGING AGENT IN STATE

The case just cited uses this language: "Foreign corporations, although having agents and transacting business in a state, come within the provision of statutes limiting the time for the commencement of actions, and making a saving as against absent debtors."[27] But this was said in a later case[28] to be only *dictum,* and the doctrine of Lawrence v. Ballou, 50 Cal. 258, which declared that "when a foreign corporation has a managing agent in this state (exercising openly his authority as such, and without fraudulent concealment), the corporation is within the state, within the intent of the statute of limitations." The insurance law involved contained no provision either granting or denying to such corporations the privilege of pleading the statute of limitations and the company had not complied with the act of 1892 (like section 406, *supra)* in regard to appointing an agent upon whom service of process could be made, but had complied with the insurance law on that subject. Under these circumstances the court held the act of 1872 not applicable and says it would be a manifest legal inconsistency to say that for the purpose of bringing an action against it here the corporation is within the state but for the purpose of making a legitimate defense to such action it is out of the state.

26 O'Brien v. Big Casino etc. Min. Co., 9 Cal. App. 283, 99 Pac. 209. It did not appear in this case whether the corporation had a managing agent in the state, nor was Harrigan v. Home Life Ins. Co., infra, referred to.

27 Pierce v. Southern Pacific Co., supra.

28 Harrigan v. Home Life Ins. Co., 128 Cal. 531-540, 58 Pac. 180, 61 Pac. 99; Tropico Land etc. Co. v. Lambourn, 170 Cal. 33, 148 Pac. 206. This doctrine originated in Lawrence v. Ballou, 50 Cal. 258.

The reasoning of this case is fortified by the fact that section 412 of the Code of Civil Procedure expressly provides that service of process upon a foreign corporation may be made upon its managing or business agent, cashier or secretary, if it have such in the state.

Also the *quere* arises, in cases where the corporation has had a managing agent, etc., in the state for a period of time equal to the time named in the statute of limitations, whether the commencement of the running of the statute can be limited to the time when it appoints an agent under section 405. Under the doctrine of the cases cited, and of section 412 of the Code of Civil Procedure, the corporation is not absent from the state for the purpose of being sued while it has such managing or business agent, cashier or secretary within the state. Section 406 does not state that the commencement of the running of the statute shall be so limited; it simply denies the right to the benefit until it has complied with this law. In like manner it expressly denies the right to defend the action on any ground until such compliance. The prohibition does not bar any other defenses which did not arise until after such compliance, nor does it expressly so bar the defense of the statute of limitations. In the case supposed, the section of the Code of Civil Procedure does not bar it. Nor, on the other hand, is it barred from maintaining a suit upon a cause of action which arose before the appointment of the agent. The state may refuse admission to a foreign corporation on any ground, or on no ground at all except its will; but, being permitted to do business within the state, the corporation can not be denied the equal protection of the laws.[29] If a state can take away one defense, it may take away two, or all. But a condition, like filing its Articles and appointing or having an agent upon whom service of process may be made

[29] American etc. Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15.

before the defense can be made, is reasonable, and has been so decided by all courts of which we know. But the condition precedent complied with, all defenses must be open to it as to all other persons.

Directly to the contrary is a decision of the district court of appeal.[80] But it cites no authority on this point; the opinion resting the decision upon the sole ground declared by it, that "this section is by its terms prospective in its operation . . . and entitles the defendant to only such benefit as might accrue after filing the designation," holding that the statute did not begin to run until the appointment of the agent. The statement is also made: "It would have been competent for the legislature to declare that there should be no limitation of time against the enforcement of any obligation of a foreign corporation."

But neither of these conclusions is evident. We do not find "by its terms" anything to indicate that the statute of limitations does not begin to run until this appointment. All such statutes begin to run from the time the cause of action accrues, unless some positive provisions postpone that time. But the right to plead it may be subject to terms or conditions. This section declares that upon the doing of a certain thing the corporation shall have the "benefit of" these laws. There is no benefit except the bar of the statute; the corporation is not entitled to the benefit of only a part of the law, or to the benefit of some other and different law, but to the same laws applicable to other persons. Under other laws, if the corporation is absent from the state, like natural persons, the duration of absence must not be counted in computing the time. As we have seen, if it has a managing or business agent in the state, it is in the state to be sued, and, if it is in the

80 Black v. Vermont Marble Co., 1 Cal. App. 718-723, 82 Pac. 1060.

state to be sued, it is not out of the state for the purpose of making all lawful defenses.

As to the second statement, that the legislature could have declared that there shall be no limitation as to time of beginning actions against foreign corporations (meaning, of course, where there is the protection of a limitation in favor of natural persons and domestic corporations), this is denying to a foreign corporation, lawfully doing business in the state, the equal protection of the law, and carries its own refutation. All discrimination is forbidden, nor can this be accomplished by arbitrary classification.[31] There is no reason why a foreign corporation, which in some legal manner has made itself subject to the process of the state, should be denied the benefit or protection of the statute of limitations when it is awarded to domestic corporations. Such a discrimination is arbitrary and unlawful.

The supreme court of the United States has said: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution."[32]

Taking away the defense is taking away the "right to defend." If the right to make this plea is taken away from those absent from the state, including residents

31 Gulf etc. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. Ed. 666, 17 Sup. Ct. 255, and many cases in that court.

32 Chambers v. Baltimore & O. R. Co., 207 U. S. 142-148, 52 L. Ed. 143, 28 Sup. Ct. 34; quoted with approval in International Textbook Co. v. Pigg, 217 U. S. 91-112, 54 L. Ed. 678, 30 Sup. Ct. 481.

of the state absent from the state, no complaint of discrimination can be made if, under like circumstances, it is taken away from foreign corporations. And the decisions of the state courts construing such equal statutes are binding on the federal courts.[33] In one case,[34] over thirty years ago, the validity of a state statute denying to foreign corporations the benefit of the statute of limitations was recognized, but the question was not considered. But there is a strong and continuous drift against all laws which are, in effect, purely discriminations.

It was decided by our supreme court[35] that a corporation which had not complied with the foregoing sections of the Civil Code could not bring an action (file a petition in insolvency under the state law) in the courts of this state. It did not appear whether the corporation had a managing or business agent in the state but it did appear that its stockholders were residents of the state, and all its property and operations were here, but the petition did not state that it was a resident of the county where the petition was filed. That such a condition can be imposed upon foreign corporations, who have not in some other lawful manner submitted to the jurisdiction of our courts, is unquestioned. While possibly not *dictum* this portion of the decision was unnecessary, because it was decided that a foreign corporation is not authorized, under that statute, to become a voluntary insolvent. Besides, such a proceeding is a winding up process, which naturally belongs to the state creating the corporation.

33 Tioga etc. R. Co. v. Blossburg etc. R. Co., 87 U. S. 137, 22 L. Ed. 331; Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316, 13 Sup. Ct. 466.

34 Union etc. Min. Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541.

35 Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398.

But there is a statement in this decision that filing its Articles of Incorporation, and appointing such an agent, were required "as a condition for doing business here," which is not borne out by the language of any of our statutes. Neither do sections 405 to 410 of the Civil Code, nor any other statute, declare that a foreign corporation can not do business in this state until it has done these things, nor that contracts (except as to real estate, by the amendment of 1911 to Civil Code, section 410) made before shall be void, as is declared in the statutes of some states. All that is provided or required is that corporations "which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein" are required to file a certified copy of their Articles of Incorporation and "at the time of filing the certified copy" above appoint a person upon whom service of process may be served. That the statutes do not prohibit foreign corporations doing business in this state was recognized in a later case,[36] where it was said no rule of the common law does so, and that in the absence of a prohibitory statute comity would permit it, and that a statute curtailing the right to maintain and defend actions will not be construed to extend beyond the plain meaning of its terms; and, making the application to section 410, *infra*, said they are only forbidden by that section to *maintain* actions, not to defend them, that to deny them this right is to deny them the equal protection of the law, and to deprive them of their property without due process of law.

The court said, further, that a corporation organized under the laws of another state is a "person" within

[36] American etc. Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 536, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15.

the meaning of the fourteenth amendment to the constitution of the United States and was entitled to the guaranties therein contained, and the order of the lower court striking out the defendant's answer because it had not complied with section 408 in regard to filing its Articles of Incorporation was reversed.[37]

MAY FILE ARTICLES, ETC., AFTER SUIT COMMENCED

In defining the expression "maintain any action" (under Civil Code, section 299) the court said that it means something more than simply commencing an action.[38] It was held that if the Articles of Incorporation, etc., were filed at the time of filing the amended complaint (though not filed when the action was commenced) it was sufficient; nor did such failure to file these papers work a forfeiture of the property acquired prior thereto.

The requirement that a foreign corporation must first appoint a resident agent upon whom process may be served, and to file a copy of its charter with the secretary of state, is unconstitutional so far as interstate transactions are concerned.[39]

FAILURE TO FILE RAISED BY PLEA ONLY

Where the complaint contains no averment that the corporation has filed its Articles of Incorporation, as required by section 299 of the Civil Code, it is not subject to demurrer for that reason only; such failure

[37] On point that corporation is a person, see Grocer's Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 476, 89 Pac. 120.

[38] Ward Land etc. Co. v. Mapes, 147 Cal. 747-752, 82 Pac. 426; California Savings etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

[39] Sioux Remedy Co. v. Cope, 235 U. S. 197, 292, 59 L. Ed. 58, 35 Sup. Ct. 57.

is a defense and can be raised only by plea in abatement.[40]

Where the complaint alleged that the plaintiff was a corporation, which averment was denied by the answer, it was held, under Civil Code, section 405, as it stood at that time, that a certified copy of its "certificate of designation of agent" was sufficient proof that the plaintiff was a corporation.[41] But the provision to that effect in that section of the code has been dropped in the amendments since adopted.

It was also decided in South Yuba, etc., v. Rosa, cited above, that section 299 did not apply to foreign corporations, but section 408 of the Civil Code now makes this same requirement of foreign as of domestic corporations.

SERVICE UPON AGENT SUFFICIENT

Notwithstanding the provision of section 411 of the Code of Civil Procedure in regard to service of summons on a managing or business agent, etc., service upon the agent appointed for that purpose under Act of 1872 (now amended, and section 405 of the Civil Code) is sufficient; the two acts are not inconsistent.[42]

TAKING MORTGAGE, NOT HOLDING PROPERTY

The taking of a mortgage securing a loan is not a purchase or holding of property within section 299 of the Civil Code requiring a corporation to file a copy of its Articles of Incorporation in every county where it holds property.[41]

40 South Yuba etc. Min. Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66; Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85, 86, 106 Pac. 720. Where a finding on a paramount issue makes this fact immaterial, see International Textbook Co. v. Holmes, 25 Cal. App. 474, 144 Pac. 146.

41 Anglo-Californian Bank v. Field, 146 Cal. 644-650, 651, 80 Pac. 1080.

42 Eureka etc. Canal Co. v. Superior Court, 66 Cal. 311-315, 5 Pac. 490.

MEETING FOR ELECTION

If the secretary of a foreign corporation, having an office and doing all its business in this state, refuses to call a meeting of the stockholders for the purpose of electing directors, the court may appoint a commissioner to make the call, and the election held pursuant thereto is valid.[43]

ASSIGNMENTS FOR BENEFIT OF CREDITORS

The *situs* of a debt due to a foreign corporation is that of the corporation. Where there are no creditors of the corporation in this state, an assignment by a corporation under the laws of another state, valid where made, carried with it any debts owing to the corporation by citizens of this state.[44] A foreign corporation can not take proceedings as a voluntary insolvent, in this state.[45]

IMPOSING CONDITIONS DENIED BY CONSTITUTION; VOID

The legislature can not impose conditions upon the right of a foreign corporation (insurance) which are not permitted by the constitution, such as taxes levied directly by the legislature.[46] The power of the legislature to impose conditions is as absolute over domestic as over foreign corporations. There is no natural right in either to do business in the state; both do business by grace and not by natural right.

43 Potomac Oil Co. v. Dye, 14 Cal. App. 674, 113 Pac. 126, 130.

44 Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 832, 58 Pac. 320.

45 Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398.

46 San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.

VENUE OF ACTIONS AGAINST

Nearly all the numerous decisions on the subject of the place of residence of a corporation have been made without reference to the fact that it was either a foreign or domestic corporation, although it is a matter of common, if not of judicial, knowledge that in a number of these cases the defendants were foreign corporations. Those decisions declare that "section 395 of the Code of Civil Procedure gives the defendant, in any personal action, other than those enumerated in the previous sections, the right to have the action tried in the county of his residence, and the residence of a corporation is the county in which its principal place of business is located."[47]

In the first case where it was expressly said that the defendant concerned was a foreign corporation the court said:[48] "Has a foreign corporation, doing business in this state, a residence in any particular county, such as is contemplated by the provision of the Code of Civil Procedure relating to the place of trial? No statute makes 'the principal place of business' of either a domestic or foreign corporation its 'residence' for the purpose of determining the county in which shall be had the trial of an action brought against it," and it was declared that "foreign corporations do not reside in this state within the meaning of the section" (Code of Civil Procedure, section 395), and that the declaration in Jenkins v. California Stage Co.[49] that the residence of a corporation is at its "principal place of business," was "*dictum.*" In the same volume of

47 Brady v. Times-Mirror Co., 106 Cal. 56, 36 Pac. 209; McSherry v. Pennsylvania etc. Min. Co., 97 Cal. 637, 643, 32 Pac. 711; Cohn v. Central Pac. R. Co., 71 Cal. 488, 12 Pac. 498, and cases cited in chapter on "Where a Corporation May be Sued," ante.

48 Thomas v. Placerville etc. M. Co., 65 Cal. 600, 4 Pac. 641.

49 Jenkins v. California Stage Co., 22 Cal. 538.

reports,[50] no showing being made whether the corporation was foreign or domestic, the statement was made for the first time that no law, statutory or common, defines the place of residence of a corporation or "making the county where the principal place of business of a corporation is situated the place of its residence, and under these circumstances we have no authority to hold such to be its place of business," and overruled the Jenkins case. But two years later this case itself was expressly overruled,[51] and the declaration in the Jenkins case was reaffirmed, and has been followed in a long line of decisions down to this day.

It should be borne in mind that the law (Civil Code, section 408), requiring foreign corporations, doing business in this state, to file a certified copy of their Articles of Incorporation in the office of the secretary of state, and also "in the office of the county clerk of the county *where its principal place of business is located,*" which is similar to the requirements of domestic corporations, was not enacted until 1905.

It is still true, as it was when those cases were decided, that no statute defines the place of residence of either a domestic or foreign corporation; the determination of that fact rests wholly upon a long line of judicial decisions, beginning with the Jenkins case.[52]

Since the enactment of Civil Code, section 408, requiring a foreign corporation doing business in this state, the same as is required of a domestic one, to establish and declare the location of its "principal place

50 California So. R. Co. v. Southern Pac. R. Co., 65 Cal. 394, 4 Pac 344.

51 Cohn v. Central Pacific R. Co., 71 Cal. 488, 12 Pac. 498, and Fresno Nat'l Bank v. Superior Court, 83 Cal. 491-497, 24 Pac. 157, and cases cited in chapter on "Where a Corporation May be Sued," ante.

52 Gallup v. Sacramento etc., 171 Cal. —; 151 Pac. 1142.

of business," that place becomes as much the residence of the foreign corporation in this state as such place becomes the residence of a domestic corporation. The reasoning which would sustain a contrary doctrine in the case of a foreign corporation would equally overthrow the rule as to domestic corporations. In Waechter v. Atchison etc. R. Co.,[58] the decision of the United States supreme court cited is not in point, for there the question was only one of "citizenship." That court, in many decisions, has said that an allegation of "residence" is not equivalent to one of "citizenship"; for a person may be a citizen of one state and reside in another. In this case the district court of appeal quotes with approval from the Placerville case: "A foreign corporation exists in and by virtue of the law of a foreign country, and no statute of this state has ever given a local (county) residence to such a corporation, where it can be sued." But the constitution, article 12, section 16, provides that a corporation may be sued in the county where its "principal place of business" is situated, and the preceding section requires it to maintain such a place, which sections have always been held to govern both foreign and domestic corporations. As to the residence of foreign corporations the statutes have said just as little, and just as much, as of the residence of domestic corporations. The decision goes on to say that no legal evidence was before the court to sustain the claim, and it was "not urged that the defendant established a principal place of residence in this state by complying with the provisions of section 408 of the Civil Code, so that the question of the residence in the state which defendant would acquire by a compliance with that section is not before us," and adds, "but if this were shown to have been done, the defendant would

[58] 10 Cal. App. 70, 101 Pac. 41. See, also, Pittman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699.

not thereby have become a domestic corporation," which is quite true but not material, and is *dictum*.

There remains only one more case[54] involving the rights of an admittedly foreign corporation. All that appears in this case as to its status is that it was "doing business in this state." There was no statement that it had an office in this state, or a principal place of business therein, or that there had been any compliance, or attempt to comply, with the requirements made of foreign corporations by Civil Code, section 408. The court held, following Thomas v. Placerville, *supra*, that the corporation could be sued in any county in the state. But, without any reference to the Placerville case, the reasoning of which is so fatally defective if the reasoning of the long line of other cases is sound, it can not be seen how the decision could be otherwise; certainly a foreign corporation establishing no residence or principal place of business in this state could occupy no better position than a natural person residing in a foreign state.

But certainly a foreign corporation, complying with Civil Code, section 408, is entitled, to the same extent as a domestic corporation, to have cases against it tried in the county where it has legally established its "principal place of business."

It has been held that assuming that a foreign corporation may be sued in any county in the state which the plaintiff may designate, such right can exist only in a case where it is the only defendant; where residents of the state are joined as defendants and the suit is brought in a county other than their residence, one such defendant is entitled to a change of the place of trial notwithstanding the opposition of other defendants who may also be residents of other counties.[55]

[54] Rains v. Diamond Match Co., probably 171 Cal. —, 153 Pac. 239.

[55] Ludington Exploration Co. v. La Fortuna etc. Min. Co., 4 Cal. App. 369, 88 Pac. 290.

Under the attachment law a corporation organized in the state of New Jersey is a non-resident of California;[56] none of the foregoing points appear to have been involved, and none of the foregoing decisions were cited in support.

It is also quite true that foreign corporations are allowed to do business in another state only by comity, and that the state has the power to exclude all except those engaged in interstate commerce. But, being lawfully admitted to a state and conducting therein a lawful business in good faith, they are entitled, on principles of natural justice, as well as by the constitution of the United States, to the equal protection of the laws as like persons (corporations) within the state; and their rights to equal protection should neither be abridged nor cut off, nor made more burdensome or less free. If there be any statute or judicial decision which permits a foreign corporation to be sued in any county of the state, which covers a territory eight hundred miles long and a third as wide, in cases where a domestic corporation can not be so sued, it is a denial of the equal protection of the laws. Permission to enter the state to do business is an extension of comity, but, being admitted, equality before the law is no longer a matter of comity; its rights thereafter are not left to depend upon the granting or withholding of favors; it should then have the same facilities for the protection and enforcement of its rights as a domestic corporation.

CORPORATION CEASING TO DO BUSINESS IN STATE, SERVICE UPON A FORMER AGENT IS VOID

Service of a summons upon a former agent of a foreign corporation which has ceased to do business in the state where the suit is brought is void, and a suit can

[56] Title Ins. etc. Co. v. California Dev. Co., 171 Cal. —, 152 Pac. 542, 561.

not be maintained on such a judgment in the state where the corporation was organized and exists, and the recital in the judgment of legal service is not *res adjudicata,* and does not estop the corporation from denying the service.[57]

NOT MORE FAVORABLE CONDITIONS

The fact that foreign corporations are not required to observe sections 290 and other sections of the Civil Code, in regard to form of organization, amount of capital stock, subscriptions, etc., is not granting them more favorable conditions for the transaction of business which is forbidden by article 12, section 15, of the constitution copied above;[58] that these code sections provide simply for the formation and organization of domestic corporations, and that the doing business referred to in this section of the constitution refers to the business of a corporation in carrying out its objects and purposes and not to the matter of its organization. It is very important that the object sought in this case be reached, but the reasoning falls short.

In regard to more favorable conditions as affecting "stockholders' liability," see that chapter, ante.

FOREIGN STEAM AND STREET RAILROADS

Section 407 of the Civil Code is as follows:

> § 407. Every railway or other corporation organized for the purpose of carrying freight or passengers under or by virtue of the laws of the United States, or of any state or territory thereof, may build railroads, exercise the right of eminent domain, and transact any other business which it might do if it were created and

[57] Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393.

[58] Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 694, 115 Pac. 1091, 1100.

> organized under or by virtue of the laws of this state, and has the same rights, privileges, and immunities, and is subject to the same laws, penalties, obligations, and burdens as if created or organized under and by virtue of the laws of this state. Nothing contained in this section shall be construed to exempt any corporation from any duty or liability imposed upon it by any of the provisions of this chapter. (Enacted March 21, 1905; Stats. 1905, p. 631.)

The district court of appeal said this section did not give foreign corporations the same rights as to place of trial of causes as domestic corporations have; that all the rights, privileges, and immunities conferred by this section pertain only to building railways, eminent domain, and matters incident thereto.[59]

Notwithstanding this section was not adopted until 1905, and foreign telegraph companies are not mentioned in it, it was held such a company was entitled to exercise the power of eminent domain under section 1001 of the Civil Code.[60] And so may all foreign corporations who have complied with our laws.[61] It was also said that this power was a result following the acts of Congress concerning telegraph companies; no reference was made to the decision of the United States Supreme Court to the effect that the business of such a company is interstate commerce and states can pass no laws restricting or obstructing such business.

It was also said the power of either a *de jure* or a *de facto* corporation to exercise eminent domain can only be questioned by a direct proceeding in the nature of *quo warranto,* and that the right of a foreign corpo-

59 Waechter v. Atchison etc. R. Co., 10 Cal. App. 70-74, 101 Pac. 41.

60 Western Union Tel. Co. v. Superior Court, 15 Cal. App. 679, 115 Pac. 1091, 1100.

61 And so may a foreign irrigation company, San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 232, 128 Pac. 924; Deseret Water etc. Irr. Co. v. State, 167 Cal. 147, 138 Pac. 981.

ration to do business in this state can not be inquired into except by a direct proceeding.

FILING ARTICLES

Section 408 of the Civil Code is as follows:

> § 408. Every corporation organized under the laws of another state, territory, or of a foreign country, which is now doing business in this state, or is maintaining an office herein, or which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the secretary of state of the state of California a certified copy of its Articles of Incorporation, or of its charter, or of the statute or statutes, or legislative, or executive, or governmental act or acts creating it, in cases where it has been created by charter, or statute, or legislative, or executive, or governmental act, duly certified by the secretary of state, or other officer authorized by the law of the jurisdiction under which such corporation is formed to certify such copy, and a certified copy thereof, duly certified by the secretary of state of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property. (Amended March 18, 1907; Stats. 1907, p. 559.)

This section is superseded by Section 1 of Chapter 190 of Statutes of 1915, p. 422 (see chapter on "Annual License Tax," post), except as to foreign corporations which filed copies of their charters prior to March 8, 1901. But even as to those corporations, the Act of 1915 requires the filing of affidavits of increases or decreases of capital stock.

The original section, out of which this section grew by successive amendments, is found in Stats. 1901, p. 108.

This section has been declared constitutional by our supreme court.[62]

The filing of certified copies of its Articles of Incorporation in the places mentioned in this section does not make a foreign corporation a domestic corporation.[63]

A foreign corporation is not required to prove that it has complied with this law as a part of its case; the burden is on the other party to prove that it has not.[64]

STATE FEES FOR FILING ARTICLES

Section 409 of the Civil Code is as follows:

> § 409. For filing and issuing a certified copy as required in section four hundred and eight of this code, corporations formed under the laws of another state, or of a territory, or of a foreign country, must pay the same fees as are paid by corporations formed under the laws of this state. (Enacted March 21, 1905; Stats. 1905, p. 631.)

While this section is not expressly repealed, it would seem to be superseded by section 1 of the Act of 1915, Stats. 1915, p. 422, above referred to.

This section originated in 1901 in the same act as the section above.

PENALTY FOR FAILING TO FILE ARTICLES

Section 410 of the Civil Code is as follows:

> § 410. Every corporation organized under the laws of another state, territory, or of a foreign country, which shall neglect or fail, within ninety days from the taking effect of this section, to comply with the conditions of sections four hundred and eight and four hun-

62 H. K. Mulford Co. v. Curry, 163 Cal. 276-289, 125 Pac. 236.

63 Waechter v. Atchison etc. R. Co., 10 Cal. App. 70-74, 101 Pac. 41.

64 Creditors' Union v. Lundy, 16 Cal. App. 567, 569, 117 Pac. 624.

dred and nine of this code, shall be subject to a fine of not less than five hundred dollars, to be recovered in any court of competent jurisdiction; and it is hereby made the duty of the secretary of state, as he may be advised that corporations are doing business in contravention of sections four hundred and eight and four hundred and nine of this code, to report the fact to the governor, who shall instruct—

(1) The district attorney of the county wherein such corporation has its principal place of business, or

(2) The attorney general of the state, or both, as soon as practicable, to institute proceedings to recover the fine provided for in this section, and the amount so recovered must be paid into the state treasury to the credit of the general fund of the state;

In addition to which penalty, no foreign corporation which shall fail to comply with sections four hundred and eight and four hundred and nine of this code can maintain any suit or action in any of the courts of this state or acquire or convey any legal title to any real property within this state, until it has complied with said section; provided, that any such corporation which, prior to the 8th day of March, 1901, shall have complied with the provisions of the act entitled "An act to amend 'An act in relation to foreign corporations,' approved April 1, 1872," approved March 17, 1899, is exempted from the provisions of this section and the two sections next preceding. (As amended, Act 1911, p. 1113.)

This section also originated in 1901, in the same act as the two preceding sections and was amended in 1905 and in 1911 to its present form, the amendment of 1911 adding the words, "or acquire or convey any legal title to any real property within this state."

It is held that this section does not prohibit a corporation which has not complied with the requirements of this law, from defending any suit which may be brought

against it,[65] but it is subject to the penalties imposed by this section.

No case involving the amendment declaring that a foreign corporation can not acquire or convey any legal title to real property in this state until it has complied with sections 408 and 409 requiring it to file a copy of its Articles of Incorporation with the secretary of state, and pay the fees imposed for such filing, has yet come before any of our appellate courts. In other states similar statutes have been held not to make such a conveyance void, there being no such declaration in the statute, and that the state only can object in a proper proceeding.[66] Such undoubtedly will be the only effect of this provision in this state.

But the question now arises whether the above section has not been, in effect, repealed by the Act of 1915, because the provisions of Civil Code, sections 408 and 409, have been superseded by provisions of the Act of 1915.

Furthermore, as we have already seen, any statute which requires a foreign corporation to appoint a resident agent upon whom service of process may be served, and to file a copy of its charter with the secretary of state, before it can maintain a suit in the state, is unconstitutional so far as it affects interstate transactions.[67]

But if the foreign corporation be also doing a local business in the state, so long as the restrictions con-

[65] American etc. Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15; Winston v. Idaho etc. Co., 23 Cal. App. 211, 137 Pac. 601.

[66] Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317, 10 Sup. Ct. 93; Thompson on Corporations, section 6688, and numerous cases there cited.

[67] Sioux Remedy Co. v. Cope, 235 U. S. 197, 292, 59 L. Ed. 58, 35 Sup. Ct. 57.

tained in the foregoing sections do not burden interstate commerce, the United States supreme court says it is well settled that these restrictions may be enforced.[68]

And, in a case of a promissory note made in Nevada to a Nevada bank upon which the Nevada bank brings suit against the maker in this state, where he is found, a denial by the defendant that the foreign corporation had complied with the provisions of this section is insufficient, if made on information and belief only.[69] Without deciding the point, the court intimated a doubt as to the legality of the prohibition contained in this section.

[68] Interstate Amusement Co. v. Albert, 239 U. S. 500, 60 L. Ed. —, 36 Sup. Ct. 168; Hooper v. California, 155 U. S. 648, 39 L. Ed. 297, 303, 15 Sup. Ct. 207.

[69] Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

CHAPTER XXXV

NO TAXATION OF SHARES OF STOCK OF DOMESTIC CORPORATION, IF ALL ITS PROPERTY IS IN THIS STATE

Article 13, section 1, of the constitution, as amended March 16, 1909, is as follows:

> § 1. All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided.
>
> The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership;
>
> Provided, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation;
>
> And further provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation.
>
> The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state.

Since the repeal of section 4, article 13, of the constitution, and the adoption of the amendment of section 1, above, containing the declaration "provided that a

mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation," no such securities issued or held by a corporation are subject to taxation.

Section 3608 of the Political Code is as follows:

> **§ 3608.** Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations, not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute. (Amended March 14, 1899; Stats. 1899, p. 96.)

This law, exemption, is a long step in recognition of the basic principles of nature. Much credit is due to this state for advanced intelligence in dealing with this subject. It falls short only in applying the corollary, while ignoring the main proposition by which the corollary was incidentally proved. If no new property is created by executing a promissory note or bond which is secured by a mortgage on land (which no discerning mind can dispute), it is first apparent that no new thing has been brought into existence by the execution of a promissory note not secured in this manner. No proposition in mathematics is more conclusively demonstrated, for it is a self-evident truth, which is the beginning of all knowledge and demonstration. The learning and sophistry brought forward in support of the claim that some new thing has thus been created

are as voluminous and profound as the ponderous volumes in support of thaumaturgy. Being without any supporting principles conforming to or expressing truth, they are equally absurd. That such ideas or theories can exist is due solely to popular prejudice against the creditor, which apparently will take as many years to remove as to overthrow the belief in magic.

As we have seen, Article 13, section 1, of the constitution provides that "all *property in the state* except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."

It will be noted that the value of property is to be ascertained "as provided by law or as hereinafter provided." The words "as hereinafter provided" were added by the amendment of 1908, but no method of ascertaining value is provided thereafter. It is further declared therein that the word "property" includes "stocks."

Section 3608 of the Political Code declares that "shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for or represent" and that to assess and tax them and also the property would be double taxation, and the preceding section, 3607, declares "but nothing in this code shall be construed to require or permit double taxation."

That shares of stock have no value separate from the property of the corporation is a self-evident truth. It is an axiom, what we are required to know beforehand; "a proposition to which every one who apprehends its meaning must assent"; and the sequence is that the contrary thereof can not be true. All knowledge is built upon self-evident truths; without them no

so-called knowledge can stand; without them there is no knowledge. This observation is made in passing, because the decisions declaring taxation of both to be valid attempt to support it by argument, and not by power or authority.

That property of a corporation, located in another state, is not "property in this state" is a self-evident truth. Neither does the stock certificate, nor the stock itself, remove the property from the state where it is situated to the state where the owner of the certificate or stock happens to reside; no more does it do this than a deed of real property, or a bill of sale of personal property, removes either from the state where they are situated. To tax a stock certificate is analogous to taxing a deed to property.

The attempt to justify the taxation by giving the stock certificate a "*situs*" in a state other than where the property is situated or where the corporation exists, violates self-evident principles, is applying a sophistry, as much as to give a deed to land situated in one state a *situs* in another state. Pages of sustaining argument only reveal the weakness of the contention; this declaration of *situs* rests alone upon power and authority. That power or authority was not exercised by the constitution, nor by the statutes, so far at least as this state is concerned.

Our constitution expressly commits the ascertaining of the *value* of property (stocks in this case) to the legislature, and that body has declared that stocks have no value separate from or above the property itself. Therefore to say that if this statute did not provide for taxing in this state the property outside of this state owned by either a domestic or foreign corporation, if the owner of the stock resides in this state, it would be unconstitutional, is a proposition unwarranted by the

English language in either the constitution or the statute; is unsupported in mid air.

To say "inhibition of double taxation only applies to such taxation in the same state or government,"[1] no one will dispute. But the reasoning falls short. No one will claim that this state can prescribe rules for taxation in other states; the statute attempts no more than to prescribe a rule for taxation by this state. If it is within the power of the legislature to define and prohibit double taxation of property within this state, it is equally within its power to prohibit it where part of the property is without the state. Having defined stock as something without value when taken by itself alone if the property, which it no more than represents, is beyond the state and can not be united with the stock by this state, it is, by its own declaration, taxing a vacuum.

There is no exception made in the statute, nor the smallest word in it which would cause the most critical and discerning to suspect that they were making any exception. This exercising of the power of double taxation is not peculiar to California, indeed this state is more free from it than most others. It rests solely upon the exercise of the will. And so far as the courts are responsible for it, the attempt to sustain it upon any other ground than the will leads them into a fallacious reasoning and a lively sophistry which, for the moment deceives themselves, and sometimes their readers.[2]

The latest declarations of the California cases[3] on this subject establish the rules:

1 Chesebrough v. San Francisco, 153 Cal. 559, 96 Pac. 288.

2 See consideration of doctrines underlying transfers of certificates, and rights thereunder, following Civil Code, section 324.

3 Chesebrough v. San Francisco, 153 Cal. 559, 96 Pac. 288; Canfield v. Los Angeles, 157 Cal. 617, 108 Pac. 705.

If all the property of a domestic corporation is located in this state the shares of its capital stock are not taxable.

If part of the property of a domestic corporation is located outside of this state, the value of the total number of shares (that is the value of the entire property) diminished by the value of the property of the corporation within and taxed by this state, fixes the value of the shares for taxation in this state, so far as they are held by residents of this state.

By parity of reasoning, if such shares are held by non-residents, while their *situs* is here for most purposes, their *situs* for taxation purposes is elsewhere; they are not taxable in this state.

TAXATION—FOREIGN CORPORATION

Stocks in a foreign corporation, owned by a resident of this state, are taxed at their full value although the entire property of the foreign corporation is located outside of this state.

We do not overlook the arguments, really a single one, brought forward to sustain this so-called principle, plausible it may be from one point of view, satisfying one observation, but so attenuated that the thread is almost invisible; nor do we overlook the fact that it is heedlessly blind to many other principles declared by the same courts, hopelessly entangling them all, nor that it is in opposition to ultimate truths which no one can rationally contradict, and which make unceasing war upon it.

As the constitution declares that all property (with certain exceptions) shall be subject to taxation, especially declaring "stocks" as one of the things constituting property, shares of stock in foreign corporations owned by citizens of this state are held to be taxable

here at their value. Following the reasoning of the Chesebrough case, cited *supra,* all property in this state owned by such foreign corporation should be deducted from the value of all the shares, and that diminished value should be the proper basis of value for taxation. But whether that should be the rule in such cases has not been decided; up to the time of that decision shares of stock in foreign corporations were assessed at their value irrespective of property owned in this state, and we believe this continues to be the practice.

TAXATION ON PUBLIC SERVICE CORPORATIONS, AND ON ALL FRANCHISES OF ALL CORPORATIONS

The tax on railroads, street railroads, transportation companies, telegraph, telephone, gas, electric light and power companies, banks and other semi-public corporations, and on all of the franchises of all corporations, by virtue of the new section (number fourteen) lately added to this article of the constitution, all goes to the state, and a special method of assessment and collection of this tax is provided in Stats. 1911, p. 530. This law, being in all respects new, no interpretation of any of its numerous and elaborate provisions has yet been made by the courts.

The decisions[4] which were rendered under the old laws in regard to the method of taxing shares of stock of state and national banks, and franchises of corporations, while interesting and learned, are believed now to be of little practical importance.

[4] Bank of California v. San Francisco, 142 Cal. 276, 100 Am. St. Rep. 130, 64 L. R. A. 918, 75 Pac. 832; Crocker v. Scott, 149 Cal. 575, 87 Pac. 102; San Francisco Nat'l Bank v. Dodge, 197 U. S. 70, 49 L. Ed. 669, 25 Sup. Ct. 384; Western Union Tel. etc. Co. v. Los Angeles, 160 Cal. 124, 116 Pac. 564, and Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557, drawing distinction between federal and state franchises.

The remaining sections of the several codes and statutes of a general nature, except as to foreign corporations and incorporation fees and annual license tax, not already copied, or referred to and commented on according to their supposed importance, are mentioned below—all of the Civil Code.

CHAPTER XXXVI

MISCELLANEOUS SECTIONS

Section 287 permits corporations organized before the codes were adopted, to reorganize under this code, and section 288 that such prior corporations shall not be affected by the provisions of this code unless they elect, under the preceding section, to come thereunder.

Section 300 provides that banking corporations having no capital stock may elect to have a capital stock, and the method of doing so.[1]

Section 364 permits corporations owning concessions, franchises, etc., in any foreign country to sell them to such foreign government or to any person or corporation.

The last two sections seem never to have been of any general importance for no reported cases seem to have depended upon them, and after forty years the first mentioned has ceased to be of use.

[1] Savings banks may be organized in this state either with or without a capital stock, Los Angeles v. State Loan & T. Co., 109 Cal. 396-401, 42 Pac. 149, and Murphy v. Pacific Bank, 119 Cal. 334-341, 51 Pac. 317. The general and uniform operation of a statute is not affected because it authorizes corporations of a certain class to adopt either one of two or more different provisions, Ibid.

CHAPTER XXXVII

FEES FOR INCORPORATION AND FORFEITURE

Section 416 of the Political Code is as follows:

§ 416. The secretary of state, for services performed in his office, must charge and collect the following fees:

1. For a copy of any law, resolution, record, or other document or paper on file in his office, twenty cents per folio.

2. For comparing a copy of any law, resolution, record, or other document or paper with the original, or the certified copy of the original, on file in his office, five cents per folio.

3. For affixing certificate and seal of state, unless otherwise provided for, two dollars.

4. For filing Articles of Incorporation, if the capital stock amounts to twenty-five thousand dollars or less, fifteen dollars; if the capital stock amounts to over twenty-five thousand dollars, and not over seventy-five thousand dollars, twenty-five dollars; if the capital stock amounts to over seventy-five thousand dollars, and not over two hundred thousand dollars, fifty dollars; if the capital stock amounts to over two hundred thousand dollars, and not over five hundred thousand dollars, seventy-five dollars; if the capital stock is over five hundred thousand dollars, and not over one million dollars, one hundred dollars; if the capital stock is over one million dollars, fifty dollars additional for every five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars; for filing Articles of Incorporation without capital stock, except co-operative associations, five dollars; for filing Articles of Incorporation of co-operative associations, formed under the act of eighteen hundred and ninety-five, and acts supplementary thereto or amendatory thereof, fifteen dollars.

5. For recording Articles of Incorporation, twenty cents per folio.

6. For issuing certificate of incorporation, three dollars.

7. For filing certificate of increase of capital stock, five dollars for every fifty thousand dollars or fraction thereof of such increase.

8. For filing certificate of decrease of capital stock, five dollars.

9. For filing notice of removal of principal place of business, five dollars.

10. For filing amended Articles of Incorporation, unless otherwise provided for, five dollars.

11. For filing certificate of creation of bonded indebtedness, or increase or decrease thereof, five dollars.

12. For issuing certificate of increase or decrease of capital stock, three dollars.

13. For filing certificate on continuance of existence, five dollars.

14. For issuing certificate of continuance of existence, three dollars.

15. For filing claim to trade-mark, and issuing certificate of filing, five dollars.

16. For issuing certificate of filing of any document, not otherwise provided for, three dollars.

17. For filing certificate of increase or decrease of number of directors, five dollars.

18. For issuing certificate of increase or decrease of number of directors, three dollars.

19. For receiving and recording each official bond, five dollars.

20. For filing notice of appointment of agent, five dollars.

21. For each commission, passport, or other document signed by the governor and attested by the secretary of state (pardons, military commissions, and extradition papers excepted), five dollars.

22. For each patent for land issued by the governor, if for one hundred and sixty acres or less, one dollar; and for each additional one hundred and sixty acres, or fraction thereof, one dollar.

23. For issuing certificate of official character, two dollars.

24. For recording miscellaneous documents or papers, twenty cents per folio.

25. For filing certified copy of order and decree of court, changing name, or certified copy of order and decree of court, dissolving a corporation, five dollars.

No member of the legislature or state officer shall be charged for any search relative to matters appertaining to the duties of their office; nor shall they be charged any fee for a certified copy of any law or resolution passed by the legislature relative to their official duties.

All fees collected by the secretary of state must, at the end of each month, be paid into the state treasury. Three thousand five hundred dollars of such monthly returns shall be credited to and constitute the state library fund, and the balance shall be paid into the general fund of the state. (Amended March 18, 1907; Stats. 1907, p. 352.)

FOREIGN CORPORATIONS

By the act of May 10, 1915 (Stats. 1915, p. 422) a flat rate of seventy-five dollars is charged a foreign corporation for filing a copy of its charter with the secretary of state.

In a recent decision, before the Act of 1915 above referred to was passed, our supreme court held Civil Code, section 409, supra (still not repealed), and Political Code, section 416 above, so far as they affected foreign corporations doing an interstate business which desired to enter this state to do business, to be in violation of the constitution of the United States, and void; that is, that no fee for filing their

Articles with the secretary of state can be imposed upon them based upon the amount of their authorized capital stock.[1] But this decision rested on the same foundation, so far as this point is concerned, as the "annual license tax" question in the same case, and on that the supreme court of the United States decided otherwise. See subject "License Tax" in pages immediately following.

But a proposed domestic corporation, in process of organization, tendering its Articles to be filed with the secretary of state, can not make the claim that it purposes to do largely an interstate business and thus escape a part or all of the "filing fee"; it was said that it may never engage in interstate business and, until in actual existence, it has no constitutional rights.[2]

1 H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236.

2 City Properties Co. v. Jordan, 163 Cal. 587, 126 Pac. 351.

CHAPTER XXXVIII

ANNUAL LICENSE TAX

The annual license tax imposed upon corporations doing business in this state, both domestic and foreign, is now contained in the act of the legislature approved May 10th, 1915, found in Stats. 1915, page 422.

The original law upon this subject is found in the Statutes of 1905, page 493, which law was amended in some part by almost every legislature which met thereafter, until, as a consequence of the Mulford decision, it was repealed.

It will be observed that the new law contains provisions other than those pertaining to license, as its title indicates; it prescribes "terms and conditions upon which corporations may transact business in this state."

The act will be given in full, and it is as follows:

§ 1. Every corporation organized under the laws of another state, territory, or of a foreign country, which is now doing business in this state or maintaining an office herein, and which has not filed with the secretary of state prior to the day on which this act takes effect the document or documents required by section four hundred and eight of the Civil Code, or which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the secretary of state of the state of California a certified copy of its Articles of Incorporation, or of its charter, or of the statute or statutes, or legislative, or executive, or governmental act or acts creating it, in cases where it has been created by charter, or statute, or legislative, or executive, or governmental act, duly certified by the

secretary of state or other officer authorized by the law of the jurisdiction under which such corporation is formed to certify such copy, and must also file a certified copy thereof, duly certified by the secretary of state of this state in the office of the county clerk of the county where its principal place of business in this state is located, and also where such corporation owns any property,

And every such corporation shall pay to the secretary of state for filing in his office such certified copy of its Articles of Incorporation, or of its charter, or of the statute or statutes, or legislative, or executive, or governmental act or acts creating it, a fee of seventy-five dollars, which fee shall be in lieu of the filing fee provided for in section four hundred and nine of the Political Code; provided, that foreign corporations organized for educational, religious, scientific, or charitable purposes and having no capital stock, shall pay a fee of five dollars for filing the document or documents hereinabove required.

Foreign corporations having a capital stock shall also file with the secretary of state copies of any documents showing an increase or decrease in their authorized capital stock, which documents shall be certified in the manner hereinabove required, but no fee shall be paid for such filing. It is hereby provided that every foreign corporation subject to the tax herein provided shall file with the secretary of state, at the time it tenders payment of said tax and any penalty which has accrued, an affidavit sworn to by its president or secretary, showing the amount of its authorized capital stock on the first day of January of the year in which said payment is made, and in the event that such authorized capital stock, as shown by such affidavit, differs from the amount of such capital stock as appears from the records of the secretary of state, then the tax herein provided shall be measured by the amount shown in such affidavit, but in such event the license herein required shall not be issued nor shall the amount so tendered be accepted until copies of any documents

relating to such change in authorized capital stock, certified as required by this section, shall have been filed with the secretary of state. If such corporation shall neglect to file such copy or copies before the hour of six o'clock p. m. of the first Monday of February of the year for which the license must be procured, it shall suffer the penalty for the delinquency herein provided and if it shall neglect to make such filing before the hour of six o'clock p. m. of the Saturday preceding the first Monday in March of such year, it shall suffer the forfeiture provided in section seven of this act; provided, however, that any foreign corporation which, prior to the eighth day of March, nineteen hundred and one, shall have complied with the provisions of the act entitled, "An act to amend 'An act in relation to foreign corporations,' approved April first, eighteen hundred and seventy-two," approved March seventeenth, eighteen hundred and ninety-nine, shall, in lieu of the provisions of this section above set forth, file the affidavit herein required and the license tax due from such corporation shall be measured by the authorized capital stock, as shown thereby.

OLD LAW

CORPORATION NOT TO DO BUSINESS WITHOUT STATE LICENSE

SECTION 1. No corporation heretofore or hereafter incorporated under the laws of this state, or of any other state, shall do or attempt to do business, by virtue of its charter or certificate of incorporation, in this state, without a state license therefor. (Section 1 as amended June 13, 1906.)

SEC. 2, after stating the amount of the fees, declared they were payable as follows:

"Said license tax or fee shall be due and payable on the first day of July of each and every year to the secretary of state, who shall pay the same into the state treasury. If not paid on or before the hour of four o'clock P. M. of the first day of September next thereafter, the same shall become delinquent and there shall be added thereto, as a penalty for such delinquency, the sum of ten dollars.

"The license tax or fee hereby provided authorizes the corporation to transact its business during the year or for any fractional part of such year in which such license tax or fee is paid. 'Year,' within the meaning

It will be noted that a flat charge of seventy-five dollars is made on a foreign corporation for filing its Articles of Incorporation in the office of the secretary

OLD LAW—*Continued*

of this act, means from and including the first day of July to and including the thirtieth day of June next thereafter."

SEC. 3. The secretary of state shall, on or before the fifteenth day of September in each year, report to the governor of the state a list of all corporations which have become delinquent, as provided in section two of this act, and the governor shall forthwith issue his proclamation, declaring under this act, that the charters of such delinquent domestic corporations will be forfeited and the right of such foreign corporations to do business in this state will be forfeited unless payment of said license tax, together with the penalty for such delinquency, as hereinbefore provided, be made to the secretary of state on or before the hour of four o'clock P. M. of the thirtieth day of November next following. (Section 3 amended June 13, 1906.)

SEC. 4. Said proclamation shall be filed immediately in the office of the secretary of state, and said secretary of state shall immediately cause a copy of said proclamation to be published in one issue of each of two daily newspapers to be selected by the governor. (Section 4 amended June 13, 1906.)

SEC. 5. At the hour of four o'clock P. M. of the thirtieth day of November each year the charters of all delinquent domestic corporations which have failed to pay the said license tax, together with said penalty for such delinquency, shall be forfeited to the state of California, and the right of all delinquent foreign corporations to do business in this state which have failed to pay said license tax, together with the penalty for such delinquency, shall be likewise forfeited. (Section 5 amended June 13, 1906.)

SEC. 8. On or before the thirty-first day of December of each year the secretary of state shall make a list of all domestic corporations whose charters have been so forfeited and of all foreign corporations whose right to do business in this state has been so forfeited, and shall transmit a certified copy thereof to each county clerk in this state, who shall file the same in his office. (Section 8 amended June 13, 1906.)

SEC. 9. It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the license tax or fee, together with the penalty for such delinquency, as in this act prescribed, to exercise the powers of such corporation, or to transact any business in this state, after the thirtieth day of November next following the delinquency. Each and every person who exercises any of the powers of a corporation so delinquent, either domestic or foreign, which has not paid the license tax, together with the penalty for such delinquency, or who transacts any business for or in behalf of any such corporation, after

of state, without regard to the amount of its total capitalization, or to the amount of its capital which is used, or to be used, in its business which may be properly intrastate in California. Whether this would not be allowing certain of them to do business in this state on more favorable conditions than domestic corporations, may be a serious question. On the other hand, under the late decisions of the United States supreme court, would not a charge graduated on the total amount of capital stock, if a part of the capital was employed in interstate commerce, be a tax upon such commerce? How can the corporation, making application to do, that

OLD LAW—*Continued*

the thirtieth day of November next following the delinquency, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than five hundred days, or by both such fine and imprisonment. (Section 9 amended June 13, 1906.)

STOCKHOLDERS TO WIND UP

SEC. 10a. In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations; provided always, that no action pending against any corporation shall abate thereby, but may be prosecuted to final judgment the same may be enforced by execution with the same force and effect and in like manner as though no forfeiture had occurred; and provided further, that where judgment has been entered against any corporation prior to forfeiture under this act, that notwithstanding execution may be issued thereon and the property of said corporation, or which may come into the hands of any trustees for it may be levied upon, seized and sold to satisfy the same with like force and effect as though such forfeiture has not occurred. (Section 10a amended March 20, 1907.)

is to begin, business in this state, say how much of its capital will be devoted to interstate business, and how much to intrastate business? And these amounts are subject to constant changes. The reasoning on this point in City Properties Co. v. Jordan, 163 Cal. 587, is equally strong against a foreign corporation as against a domestic corporation declaring at the commencement of business that only a certain proportion of its capital would be devoted to intrastate business.

While section 408 of the Civil Code is not expressly repealed, it would seem that, as to all foreign corporations entering the state after March 8th, 1901, that it had been superseded by this new law.

> § 2. Upon filing in the office of the secretary of state the certified copy of Articles of Incorporation of corporations organized under the laws of this state, there shall be paid to the secretary of state the fees prescribed therefor by section four hundred and nine of the Political Code.
>
> § 3. No corporation heretofore or hereafter incorporated under the laws of this state, or of any other state, territory, or foreign country, shall do or attempt to do any intrastate business within this state by virtue of its charter, or certificate of incorporation, without a state license therefor.
>
> § 4. It shall be the duty of every corporation incorporated under the laws of this state, and of every corporation incorporated under the laws of any other state, territory, or foreign country, now doing intrastate business within this state, or which shall hereafter engage in intrastate business in this state, to procure annually from the secretary of state a license authorizing the transaction of such business in this state, and to pay therefor the license tax prescribed herein.
>
> For the purpose of measuring said tax the secretary of state shall examine all Articles of Incorporation and all documents on file in his office relating to an

increase or decrease in the authorized capital stock of corporations which are subject to said tax, and determine the amount due from each corporation by the following rule:

When the authorized capital stock of the corporation does not exceed ten thousand dollars ($10,000.00) the tax shall be ten dollars ($10.00);

When the authorized capital stock exceeds ten thousand dollars ($10,000.00) but does not exceed twenty thousand dollars ($20,000.00) the tax shall be fifteen dollars ($15.00);

When the authorized capital stock exceeds twenty thousand dollars ($20,000.00) but does not exceed fifty thousand dollars ($50,000.00) the tax shall be twenty dollars ($20.00);

When the authorized capital stock exceeds fifty thousand dollars ($50,000.00) but does not exceed one hundred thousand dollars ($100,000.00) the tax shall be twenty-five dollars ($25.00);

When the authorized capital stock exceeds one hundred thousand dollars ($100,000.00) but does not exceed two hundred and fifty thousand dollars ($250,000.00) the tax shall be fifty dollars ($50.00);

When the authorized capital stock exceeds two hundred and fifty thousand dollars ($250,000.00), but does not exceed five hundred thousand dollars ($500,000.00) the tax shall be seventy-five dollars ($75.00);

When the authorized capital stock exceeds five hundred thousand dollars ($500,000.00) but does not exceed one million dollars ($1,000,000.00) the tax shall be one hundred dollars ($100 00);

When the authorized capital stock exceeds one million dollars ($1,000,000.00) but does not exceed three million dollars ($3,000,000.00) the tax shall be two hundred dollars ($200.00);

When the authorized capital stock exceeds three million dollars ($3,000,000.00) but does not exceed five million dollars ($5,000,000.00) the tax shall be three hundred and fifty dollars ($350.00);

When the authorized capital stock exceeds five million dollars ($5,000,000.00) but does not exceed seven million five hundred thousand dollars ($7,500,000.00) the tax shall be five hundred fifty dollars ($550.00);

When the authorized capital stock exceeds seven million five hundred thousand dollars ($7,500,000.00) but does not exceed ten million dollars ($10,000,000.00) the tax shall be eight hundred dollars ($800.00);

When the authorized capital stock exceeds ten million dollars ($10,000,000.00) the tax shall be one thousand dollars ($1,000.00).

All corporations having no capital stock, but organized for profit, shall pay an annual tax of ten dollars ($10.00).

Said license tax shall be due and payable to the secretary of state on the first day of January of each and every year. Such license tax shall be paid on or before the hour of six o'clock p. m. of the first Monday of February of each year and if not so paid shall at said hour become delinquent and there shall thereupon be added thereto as a penalty for such delinquency the sum of ten dollars ($10.00).

§ 5. The license hereby provided authorizes the corporation holding the same to transact intrastate business in this state during the year or any fractional part of such year for which such license is issued. "Year," within the meaning of this act, means from and including the first day of January to and including the thirty-first day of December next thereafter.

§ 6. At the time of filing any certified copy of Articles of Incorporation, or charter, or statute or statutes, or legislative, or executive, or governmental act or acts creating a corporation, when filed between the first day of January and the thirty-first day of December, inclusive, in any year, there shall be paid to the secretary of state, in addition to all other fees required by law, that proportion of the license tax specified in section four of this act which the unexpired number of months of such year bears to the entire year

including the month in which such filing occurs, and thereupon the secretary of state shall issue a license for such fractional part of the then current year.

§ 7. At the hour of six o'clock p. m. of the Saturday preceding the first Monday in March of each year the charters of all corporations organized under the laws of this state and which have failed to pay the license tax and penalty prescribed by section four of this act shall be forfeited to the state of California, and the right of all foreign corporations to do intrastate business in this state, which have failed to pay said license tax and penalties shall be likewise forfeited.

§ 8. Educational, religious, scientific and charitable corporations, corporations which are not organized for profit, and corporations doing solely an interstate business and those corporations enumerated in subdivisions (a), (b) and (c) of section 14 of article XIII of the constitution are exempt from the payment of the tax provided by this act.

In addition to exempting educational and sundry other corporations, named, it will be noted that for the first time in this state corporations doing solely an interstate business are also exempt. The corporations named in the clauses of the constitution referred to are railroad and other public service corporations, insurance companies and banks which also are exempt.

§ 9. Any corporation claiming exemption from the payment of said annual license tax must file with the secretary of state at least sixty days before such tax becomes due and payable a written protest in which it shall set forth all facts and reasons upon which such exemption claim is made, sworn to by the president and secretary or general manager of such corporation. Failure to protest in the manner and within the time herein prescribed shall constitute a waiver of all rights of exemption from said tax. Such corporation shall furnish under oath such other proof as the secretary of

state may require or demand. All evidence and proofs submitted upon such claim of exemption shall be submitted by the secretary of state to the board of control and state controller, and said officers shall thereupon determine the question of such corporation's claim of exemption. The determination of said officers upon all questions of fact shall be final and conclusive; provided, however, that at the time of filing a certified copy of the Articles of Incorporation of any domestic corporation in the office of the secretary of state, and at the time a foreign corporation files with the secretary of state the document or documents required by section one of this act, the secretary of state shall determine whether such corporation is exempt as an educational, religious, scientific, or charitable corporation or as a non-profit corporation or as one of the corporations enumerated in subdivisions (a), (b) and (c) of section 14 of article XIII of the constitution.

§ 10. If the license tax and penalties for delinquency required to be paid by section four of this act are not paid within the time herein required, the secretary of state shall on the Saturday preceding the first Monday in March, and at six o'clock p. m. of said day, enter upon the record of corporations in his office against the name of any company so failing to pay said license tax and penalty the words "charter forfeited to the state," if the corporation be a domestic corporation, and thereupon said charter shall be ipso facto so forfeited, and the words "right to do intrastate business forfeited" if the corporation be a foreign corporation, and thereupon said right to do intrastate business in this state shall be ipso facto so forfeited.

§ 11. On or before the first Monday of April of each year the secretary of state shall make a list of all domestic corporations whose charters have been so forfeited, and of all foreign corporations whose right to do intrastate business in this state has been so forfeited or which have surrendered their right to do intrastate business in this state as provided in section

fifteen of this act, and shall transmit a certified copy thereof to each county clerk in this state, who shall file the same in his office.

§ 12. It shall be unlawful for any corporation, either domestic or foreign, which has not paid the license tax, as in this act prescribed, to exercise the powers of such corporation, or to transact any intrastate business in this state, after six o'clock p. m. of the Saturday preceding the first Monday in March next following the delinquency. Each and every person who exercises any of the powers of a corporation which has forfeited its charter or right to do intrastate business in this state, or who transacts any business for or in behalf of such corporation, after such forfeiture, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment.

§ 13. In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations; provided, always, that no action pending against any corporation shall abate thereby, but may be prosecuted to final judgment and may be enforced by execution with the same force

and effect and in like manner as though no forfeiture had occurred; and provided, further, that where judgment has been entered against any corporation prior to forfeiture under this act, that notwithstanding, execution may be issued thereon and the property of said corporation, or that may come into the hands of any trustees for it may be levied upon, seized and sold to satisfy the same with like force and effect as though such forfeiture had not occurred.

This section is a verbatim copy of section 10a (Stats. 1907, p. 746) of the former license-tax law. Two important decisions were rendered upon the former section; one declaring that thereupon the corporation ceased to exist, and that the trustees could maintain a cross-complaint against any person suing them, and the other that judicial proceedings declaring a forfeiture are not necessary, and concerning non-abatement of actions pending against the corporation, continuing defense, and right of appeal. See Lowe v. Superior Court, 165 Cal. 708; Brandon v. Umpqua etc., 166 Cal. 322.

§ 14. Any domestic corporation which suffers the forfeiture prescribed by this act, may pay to the secretary of state all taxes and penalties which shall have accrued prior to such forfeiture, and all taxes and penalties which would have accrued if such forfeiture had not occurred; and shall file an application with the secretary of state for the restoration of its charter, which application must set forth the names of the persons who became trustees upon such forfeiture, under the provisions of section 13 of this act, and shall be signed by all of said persons then surviving, and acknowledged by each of said persons before an officer authorized by the laws of this state to take acknowledgments of conveyances of real property; whereupon such corporation shall be restored to its former corporate status and the secretary of state shall issue to such corporation a license entitling it to transact intrastate business in this state during the year in which such license is issued;

provided, however, that no corporation organized under the laws of this state which suffers such forfeiture shall be relieved from the effect thereof, nor shall such license be issued, in the event that subsequent to the date of forfeiture its corporate name, or a name so closely resembling said name as will tend to deceive, has been adopted and is in use by another domestic corporation.

Any foreign corporation which suffers a forfeiture of its right to do intrastate business in this state, may pay to the secretary of state all taxes and penalties which shall have accrued prior to such forfeiture, and all taxes and penalties which would have accrued if such forfeiture had not occurred, and shall file with the secretary of state its application for a restoration of its right to do intrastate business, and copies of any documents increasing or decreasing its capital stock, certified as hereinbefore provided, together with an affidavit by its president or secretary, setting forth the amount of its authorized capital stock on the first day of January of the year in which said application is presented, and the taxes which would have accrued after the date of such forfeiture shall be measured by the authorized capital stock, as shown by such copies and affidavits; whereupon such corporation shall be restored to its former corporate status and the secretary of state shall issue to such corporation a license entitling it to do intrastate business in this state during the year in which such license is issued.

Any domestic corporation which has heretofore suffered a forfeiture of its charter under the provisions of an act entitled "An act relating to revenue and taxation, providing for a license tax upon corporations and making an appropriation for the purpose of carrying out the objects of this act," approved March 20, 1905, or under the provisions of any act amendatory thereof, may be restored to its former corporate status, subject to and upon complying with the conditions hereinabove provided for the reinstatement of domestic corporations which suffer the forfeiture prescribed by this act, and

in addition thereto, upon payment of the taxes and penalties which would have accrued under said act of 1905, or any of the acts amendatory thereof, if such forfeiture had not occurred.

Any foreign corporation which has suffered a forfeiture of its right to do business in this state under the provisions of said act of 1905, or any act amendatory thereof, may be relieved from the effect thereof and resume an intrastate business in this state upon filing with the secretary of state an affidavit by its president or secretary, setting forth the amount of its capital stock at time of taking effect of this act, and stating any subsequent changes in said authorized capital stock, and the dates on which such changes become effective, and shall pay to the secretary of state all taxes and penalties which would have accrued under said act of 1905, or under any of the acts amendatory thereof if such forfeiture had not occurred, and the taxes and penalties which would have accrued under the provisions of this act; whereupon such corporation shall be restored to its former corporate status and the secretary of state shall issue to such corporation a license entitling it to do intrastate business in this state during the year for which the license is issued. And the secretary of state shall, on or before the first Monday of April of each year, make a list of the corporations, both foreign and domestic, so paying, and of the foreign corporations which have resumed the transaction of intrastate business in this state, as provided in section fifteen of this act, and shall transmit a certified copy of said list to each county clerk in this state, who shall file the same in his office; provided, the rehabilitation of any such corporation by reason of making such payments shall be without prejudice to any action, defense, or right which accrued by reason of the original forfeiture.

Restoration of the rights of a domestic corporation is subject to the risk that, in the meantime, another corporation may have been formed with the same, or a

similar name, in which case the old corporation appears to have no right to be relieved of its forfeiture, and to be revived.

§ 15. Any foreign corporation may surrender its right to engage in intrastate business in this state by filing a stipulation with the secretary of state, in which it shall agree that it will not transact such business at any time thereafter without first obtaining from the secretary of state a license authorizing the resumption of such business, as hereinafter provided. Upon the filing of such stipulation and upon the payment of any tax or penalty then due, said corporation shall be exempt from the payment of the tax provided in this act. It shall be unlawful for any such corporation to exercise its corporate powers in transacting any intrastate business in this state after the filing of such stipulation. Each and every person who exercises any of the powers of such corporation in the transaction of intrastate business or who transacts any intrastate business for or in behalf of such corporation after such filing shall be subject to penalties prescribed by section twelve of this act.

Any such corporation may resume the transaction of intrastate business in this state at any time thereafter upon filing its application for a license therefor with the secretary of state and an affidavit by its president or secretary setting forth the amount of its authorized capital stock, and copies of any documents increasing or diminishing such capital stock, which copies shall be certified as herein provided, and upon paying a tax for the unexpired portion of the year which shall be measured by its authorized capital stock and which shall be that portion of the license tax specified in section 4 of this act which the unexpired number of months of such year, including the month in which such license is issued, bears to the entire year.

§ 16. Any false statement contained in any of the affidavits herein required shall constitute perjury, and shall be punishable as such.

§ 17. All moneys herein required to be paid shall, upon collection by the secretary of state, be immediately paid by him into the state treasury.

§ 18. Nothing in this act shall be construed as affecting or repealing any statute of this state respecting the assessment of franchises and levying of taxes thereon.

§ 19. The provisions of this act in so far as they relate to the payment of the license tax provided for in section four of this act shall take effect on the first day of January, 1916, and as to all other provisions this act shall take effect ninety days after final adjournment of the forty-first session of the legislature.

A corporation whose charter has been forfeited for failure to pay the license tax can not even transfer stock on its books thereafter from a seller to a purchaser.[1]

The effect of the decision in the Mulford case[2] was so nearly destructive of every important feature of the "annual license tax" law that the next legislature repealed it, as we have said, and adopted in lieu of it a "franchise tax"; the important features of it affecting ordinary corporations will be given hereafter.

Our old license law (partially quoted above) was held to be in violation of the constitution of the United States, not of California, so far as it affected foreign corporations doing partially an interstate business, and the whole act, for all practical purposes, fell, and the court saying "in view of our duty in pointing out for future legislative action," pointed out many other things for remedy by the legislature which were not involved in the case before them.

The decisions of the United States supreme court cited by our own supreme court in support of this decision, to the casual observer, seemed quite in point,

1 Lewis v. Miller & Lux, 156 Cal. 101, 103 Pac. 496. See People v. California etc. T. Co., 18 Cal. App. 732, 124 Pac. 558.

2 H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236.

and decisive. But the Massachusetts supreme court distinguished them from the case of an "ordinary corporation," by saying that they were either railroad, telegraph, or express company cases, and that "these cases all relate to corporations directly engaged for hire in transportation of intelligence or commerce or persons between the states . . . their main business was interstate commerce of a *quasi* public character," and said of their property that it was "in its nature permanent, irremovable and inadaptable to other purposes, upon the faith of an existing law of the state," and noted other important points of difference.[3] That court upheld the validity of the statutes.

The case, with two or three others which were consolidated with it, went to the supreme court of the United States, which sustained the decision of the state court. The opinion of the Massachusetts supreme court was long and exhaustive, clearly discerning and discriminating, logical and well reasoned. The United States supreme court adopted many of its views, and even expressions, saying that the tax was not one on property but an excise, and that the interstate and domestic businesses were not inseparable, that the business for which they were incorporated was not of itself commerce, and, adding a new one, said of graduating the amount of the tax that "the authorized capital is only used as the measure of a tax, in itself lawful."[4]

It would be difficult to get two cases more nearly identical than the Baltic and White case, and the Mulford case.

[3] S. S. White Dental etc. Co. v. Commonwealth, 212 Mass. 35, Ann. Cas. 1913C, 805, 98 N. E. 1056; the plaintiff manufacturing and selling dental supplies, and the plaintiff in the Mulford case "manufacturing and selling tablets, pills," etc., thus being quite alike in the nature of their business.

[4] Baltic Mining Co. (and S. S. White Dental Co.) v. Commonwealth of Massachusetts, 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. 15.

In view of this decision of the supreme court of the United States, there remained nothing for our supreme court to do but to overrule the Mulford case. This they did when the point again came before them, but solely upon the authority of the Baltic and White case, and supported their former views in a long opinion, which is unusually well reasoned and convincing, and cited many authorities on the principle involved.[5]

It should be said that it is much easier to see behind us than into the unexplored future, especially in cases where the event, like in these, is almost wholly dependent upon authority; in other words, upon the will.

Every domestic corporation, except those not organized for pecuniary profit mentioned in section 7, was required to pay this annual license tax whether it actually transacted or attempted to transact business in this state, and the failure to pay this tax by four o'clock P. M. on November thirtieth, *ipso facto* worked a forfeiture of its charter; it was not necessary that the forfeiture be first established by the decree of a court.[6] This statute was self-executing. It was held in the case cited that this tax is not a tax on property but merely an annual charge or excise imposed by the state for the privilege obtained from it of being and continuing to exist as a corporation; and by virtue of the power of the legislature to amend or repeal laws concerning corpora-

[5] Albert Pick & Co. v. Jordan, 169 Cal. 1, 145 Pac. 506.

[6] Kaiser Land and Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341, and it ceases to exist, Lewis v. Miller & Lux, 156 Cal. 101, 103 Pac. 496. It can not be sued; a judgment against it is void, Newhall v. Western Zinc etc. Co., 164 Cal. 380, 382, 128 Pac. 1040; Lowe v. Superior Court, 165 Cal. 708, 134 Pac. 190; Brandon v. Umpqua, 166 Cal. 322, 136 Pac. 62; Llewellyn Iron Works v. Albert Kinney Co., 171 Cal. —. But the above section so modifies Civil Code, section 400, as to cases of forfeiture under these sections, that a suit already pending at that time may be continued in the name of the corporation, Lowe v. Superior Court, supra, and Brandon v. Umpqua, supra.

tions reserved in the constitution, this law is applicable to corporations organized before this law was passed, as well as to those organized afterward, and to domestic corporations whether they do any business in the state or not. It was also held that this forfeiture was not taking property without due process of law because there was no personal notice or judicial hearing, for the reason that the grant of the privilege to be and to continue to be a corporation is really upon a condition subsequent, the happening of which, *ipso facto* withdraws that privilege. It was also held that there was no improper delegation of authority to the secretary of state and the governor; they do not judicially determine the facts although certain action in certain circumstances is required of them; if the fact of non-payment does not exist there is no forfeiture no matter what the secretary of state or the governor may do. It would follow, therefore, that all a court could do would be to determine whether the requisite facts existed; if so the forfeiture results by operation of the statute, independent of any decree by the court; the real effect of the judgment of the court would be ascertaining and declaring the facts and, if found to exist or not to exist, to restrain the corporation from further operations, or to declare that no forfeiture had occurred; not to forfeit, or to refuse to forfeit the charter by its own act.

Although the corporation in this case was a domestic one, the imposition of a similar tax upon foreign corporations became involved in the contention that they were allowed to do business in the state "on more favorable conditions" than domestic corporations, in that the penalty on foreign corporations was less severe, being only a forfeiture of their rights to do business in the state and not a forfeiture of their charters. The court well said the conditions upon which foreign corporations are allowed to do business here are identical with those imposed on domestic corpora-

tions; that in each case the state takes away what it has given, and no more, and all it can take away; that the law is no less uniform because it operates differently upon different classes, because there is a reasonable basis for a different classification, and that the difference in power of the state over domestic and foreign corporations furnishes a rational and proper basis for providing a different penalty.

The exception, or probably waiver, contained in section 6, permitting corporations then in default to pay before a date fixed, was also considered, it being claimed that this provision indicated that the legislature did not intend that the other provisions should *ipso facto* work a forfeiture.

The court said these provisions were intended only to relieve corporations of a forfeiture "*that had already occurred.*"

The language of the section, as it then stood, was substantially the same as the present section.

This decision (Kaiser etc. v. Curry) was approved and followed in a case[7] decided shortly afterward. The later case involved some additional points, declaring that it made no difference that the corporation (also a domestic corporation) was a holding corporation actually engaged in no active business; it being repeated that the tax is imposed upon its right of continued existence. Also that the words "forthwith" and "immediately," in regard to the secretary of state making the list of delinquent corporations and the issuance of the governor's proclamation, while calling for a speedy performance, yet require only what would be reasonable promptness, considering the circumstances and the other duties of those officers, and also

7 Lewis v. Curry, 156 Cal. 93, 103 Pac. 493.

that it is not necessary that the governor's proclamation distinguish between domestic and foreign corporations.

OCCUPATION LICENSE TAX

That a city may impose a license tax upon corporations conducting any particular kind of business therein is well settled in this state. The case decided was one where the tax was imposed on all persons, whether corporations or natural persons, engaged in a particular business—not upon corporations alone.[8]

If the secretary of state exacts a license fee from a corporation as a condition of not declaring its charter forfeited, when the corporation is not liable for the payment of such a tax, paying the money under protest is not a voluntary payment; but if the secretary of state has turned the money into the state treasury he is not personally liable to the corporation in a suit against him to recover the same.[9] As the state can not be sued on such a claim, an appeal to the state board of control, or to the legislature, is the only means of recovering back any such payments.

DIRECTORS ARE TRUSTEES TO LIQUIDATE

Section 10a of that act, as under the amendment of 1915, provided when a forfeiture occurred under that act the directors, as trustees, should settle up the affairs of the corporation. An order of court substituting the directors of a foreign corporation, whose right to do business in this state has been forfeited under this act, in the place of the plaintiff corporation was held to be proper, and it does not matter if they are only *de facto*

[8] Los Angeles v. Los Angeles etc. Gas Co., 152 Cal. 765, 93 Pac. 1006.

[9] Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 Pac. 839.

directors.[10] The decisions under Civil Code, section 400, are more or less applicable to this section, and see chapter on "Receivership Under the Statutes," ante. *Mandamus* is not an appropriate remedy to compel the trustees to perform some duty; the equity powers of the court are sufficient.[11]

PENALTY ON DELINQUENCY

A decision under these statutes, before the later amendments, that the penalty of five dollars (now ten dollars) did not attach until the proclamation of the governor is made[12] is not applicable to the law as amended; for then this penalty attached on September 1st, by force of the statute.

SOCIAL CLUBS

A *bona fide* social club, extending its privileges to its members only as to its property and facilities for purely social entertainment is not engaged in a "business" in a commercial sense, but still is of such a nature that it is within the power of a city to impose an annual license tax for its privilege of selling liquors even to its own members.[13]

FRANCHISE TAX LAW

The sections of the franchise tax law applicable to ordinary corporations which are of importance for directors and stockholders to know are:

10 Reed & Co. v. Harshall, 12 Cal. App. 697-704, 108 Pac. 719; Carpenter v. Bradford, 23 Cal. App. 560, 138 Pac. 946. It was said in this case that a foreign corporation, so failing, was not exactly "defunct," but at least was in a condition of "suspended animation," so far as this state is concerned.

11 Turney v. Morrisey, 22 Cal. App. 271, 134 Pac. 335.

12 Ukiah Guaranty Co. v. Curry, 148 Cal. 256, 82 Pac. 1048.

13 Cuzner v. California Club, 155 Cal. 303, 20 L. R. A. (N. S.) 1095, 100 Pac. 868.

§ 5. All franchises, other than those of the companies mentioned in sections two, three and four of this act, shall be assessed at their actual cash value, after making due deduction for good will, in the manner hereinafter provided, and shall be taxed as the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state. These franchises shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this state and the actual exercise of the right to do business as a corporation in this state when such right is exercised by a corporation incorporated under the laws of any other state or country, also the right, authority, privilege, or permission to maintain wharves, ferries, toll roads, and toll bridges, and to construct, maintain or operate, in, under, above, upon, through or along any streets, highways, public places, or waters, any mains, pipes, canals, ditches, tanks, conduits or other means for conducting water, oil, or other substances. (Stats. 1913, p. 6.)

Section 14 (Stats. 1913, p. 619) requires an annual report, going into many details. The state sends out blanks with full explanations, each year to every corporation, to be filled in by them, so a copy of this section, which is very long, is not thought necessary.

Section 16 (Stats. 1911, p. 530) provides for an arbitrary assessment, if corporation does not make report.

Company failing to report subject to a fine of $300 to $5,000.

Person signing false report is guilty of a misdemeanor subject to a fine of $300 to $5000, or to imprisonment for one year, or both.

Section 20 (Stats. 1911, p. 530) provides that the taxes levied pursuant to section 14, above, shall be

Due the first Monday of July.

Delinquent (first half) on the sixth Monday thereafter at 6 o'clock p. m.

Penalty 15% if not then paid.

Penalty 5% on first Monday of February at 6 o'clock p. m.

Delinquent (second half) on the first Monday of February, at 6 o'clock p. m.

Penalty, 5%, if not then paid.

If these taxes are not a lien upon sufficient real estate, they are to be collected the first Monday of August after they are levied.

NOTICE TO DELINQUENT COMPANIES

§ 24. Within ten days after the first Monday in February, the controller shall send by mail to the last known address of any company whose taxes are delinquent a notice of the amount of said taxes, penalties, and costs, and that if the said taxes, penalties, and costs are not paid on or before the Saturday preceding the first Monday in March next thereafter at six o'clock p. m. of said day, the delinquent company if it be a domestic corporation will forfeit its charter to the state, and that if the delinquent company be a foreign corporation it will forfeit its right to do business in this state.

CHARTER FORFEITED

If the taxes, penalties, and costs are not paid within the time specified in said notice, the controller shall, on said Saturday preceding the first Monday in March at six o'clock p. m. of said day, mark on the record of assessments for state taxes opposite the assessment of the delinquent company the words "charter forfeited to the state," if the delinquent company be a domestic corporation, and thereupon said charter shall be so forfeited, and if the delinquent company be a foreign corporation the words "right to do business forfeited" and thereupon said right to do business shall be so forfeited. He shall at once report to the secretary of state the name and number of charter of each corpora-

tion whose charter or right to do business has been forfeited for non-payment of taxes, and the secretary of state shall at once report the same to the governor.

GOVERNOR'S PROCLAMATION

The governor shall forthwith issue his proclamation, declaring that the charters of such domestic corporations have been forfeited and the right of such foreign corporations to do business in this state has been forfeited. Said proclamation shall be filed immediately in the office of the secretary of state, and immediately thereafter a copy of said proclamation shall be published in the manner provided by law in one issue of one daily newspaper of general circulation published at the state capital, of one daily newspaper of general circulation published in the city and county of San Francisco, and of one daily newspaper of general circulation published in the city of Los Angeles. The secretary of state shall thereupon transmit a certified copy of the proclamation to each county clerk in this state, who shall file the same in his office.

RELIEF FROM FORFEITURE

Any such corporation making subsequent payment of all taxes, penalties, and costs due the state, and in addition thereto an amount equal to the taxes levied under this act for the year in which such forfeiture occurred, for each year subsequent to such forfeiture and to the time of such redemption, shall be relieved of such forfeiture, and the controller shall notify the secretary of state thereof, and the secretary of state shall annually on the first Monday in April transmit to the county clerk of each county in this state a list of the corporations so paying, and which have been relieved of such forfeiture, which list shall be by said county clerk filed in his office; provided, the rehabilitation of a corporation under the provisions of this act shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture;

NEW NAME OF REVIVED COMPANIES

And provided, that in case the name of any corporation which has suffered the forfeiture prescribed in this act, or a name so closely resembling the name of such corporation as will tend to deceive, has been adopted by any other corporation since the date of said forfeiture, then said corporation having suffered such forfeiture shall be relieved therefrom pursuant to the terms of this section only upon the adoption by said corporation seeking revivor of a new name, and in such case nothing in this act contained shall be construed as permitting such corporation to be revived or carry on any business under its former name; and such corporation shall have the right to use its former name or take such new name only upon filing an application therefor with the secretary of state and upon the issuing of a certificate to such corporation by the secretary of state setting forth the right of such corporation to take such new name or use its former name, as the case may be;

LIMITATION ON NAMES

Provided, however, that the secretary of state shall not issue any certificate permitting any corporation to take or use the name of any corporation heretofore organized in this state, and which has not suffered a forfeiture prescribed by this act, or to make or use a name so closely resembling the name of such corporation heretofore organized in this state as will tend to deceive. The provisions of title 9, part 3 of the Code of Civil Procedure, in so far as they conflict with this section, are not applicable to corporations seeking revivor under this act.

ACTION TO COLLECT TAX

The controller may, on or before the thirtieth day of April next following said delinquency and forfeiture, bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people

of the state of California, to collect any delinquent taxes, together with any penalties, or costs, which have not been paid in accordance with the provisions of this act and appearing delinquent upon the record of assessments for state taxes hereinbefore in this act provided for. The attorney general must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.

ATTACHMENT

In such action a writ of attachment may be issued, and no bond or affidavit previous to the issuing of said attachment is required. In the case of companies whose charters or right to do business have been forfeited under the provisions of this act, service of summons may be made upon the persons now provided for by law to be served as agents or officers of any of such companies and such persons shall be deemed to be the agents of such companies for all purposes necessary in order to prosecute such action. Payment of the taxes and penalties, or amount of the judgment recovered in such action must be made to the state treasurer. In such actions the record of assessments for state taxes, or a copy of so much thereof as is applicable in said action, duly certified by the controller, or by the secretary of the state board of equalization, showing unpaid taxes against any company, person or association assessed by the state board of equalization, is prima facie evidence of the assessment upon the property and franchises, the delinquency, the amount of the taxes, penalties, and costs due and unpaid to the state, and that the company, person, or association is indebted to the people of the state of California in the amount of taxes and penalties therein appearing unpaid, and that all forms of law in relation to the assessment and levy of such taxes have been complied with. (Stats. 1913, p. 7.)

UNLAWFUL FOR COMPANIES WHICH HAVE NOT PAID TAX TO OPERATE

§ 24a. It shall be unlawful for any company, either domestic or foreign, which has not paid to the state all taxes, penalties and costs as in this act prescribed and levied, to exercise the powers of such company, or to transact any business in this state, after the Saturday preceding the first Monday in March following its delinquency.

PENALTY

Each and every person exercising any of the powers of such delinquent company or transacting any business for or in behalf of such company after the Saturday preceding the first Monday in March following the delinquency of such company as provided in this act, except to settle the affairs of such company, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such violation of the law continues, which fine shall be paid into the general fund of the state treasury. (Stats. 1913, p. 625.)

CHAPTER XXXIX

MINING COMPANIES AND THEIR REPORTS

The penalty of $1,000 imposed by the act of 1880 upon directors of a mining company for failure to post a verified balance sheet in the office of the company (now materially amended, see section 588 of the Civil Code, post) is penal in its nature, but no more than one penalty may be recovered although they failed for several months before suit to post these balance sheets;[1] the law will be strictly enforced and the balance sheets must be posted on time, and lack of sufficient information on the part of the directors is no defense.[2] If a "balance sheet" is posted the statute is complied with, without posting an itemized account; the statute is in the alternative.[3] The act is constitutional and it is not necessary to show that the failure to post the account is willful;[4] if any facts exist which would excuse the failure they must be set forth and proved. The failure of a company to have an office will not excuse the directors; it is the duty of the company to have an office,[5] and each failure is a delinquency if sued on as it occurs,[6] and it does not matter whether the company is actually carrying on business if it was formed for that purpose,[7] and while the account may

1 Loveland v. Garner, 71 Cal. 541, 12 Pac. 616.

2 Schenck v. Bandmann, 81 Cal. 231, 22 Pac. 654.

3 Eyre v. Harmon, 92 Cal. 580, 28 Pac. 779.

4 Miles v. Woodward, 115 Cal. 308, 314, 46 Pac. 1076; Ball v. Tolman, 119 Cal. 358, 51 Pac. 546.

5 Chapman v. Doray, 89 Cal. 52, 26 Pac. 605.

6 Schofield v. Doray, 89 Cal. 55, 26 Pac. 606; Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

7 Francais v. Somps, 92 Cal. 503, 28 Pac. 592.

cover a period greater than one month if it is not verified by the superintendent the penalty may be recovered.[8] No actual damages need to be proved.

PENALTIES

Under the amendment to section 590, Civil Code, post, the extent of the liability of the president for refusing to issue the order granting the privilege is limited to $1,000, and the superintendent failing to obey the order to a like penalty, and to forfeiture of his salary, and he can never be employed again by the corporation; the liability of the directors for failing to have the reports and accounts posted is limited to the actual damage sustained by the stockholder. The provision in the Act of 1897 limiting these liabilities to corporations whose stock is listed on some public exchange was left out of this section when it was put in the code.

Sections 588 and 589 of the Civil Code are to be construed together, as to the penalties provided, and the penalty provided by section 589 may be imposed upon the officer for the refusal to allow the stockholder to take samples to which he is entitled under the former section.[9]

MANDAMUS—FOREIGN CORPORATIONS

The officers of a foreign mining company, whose mines are in another state, but the corporation having its principal office in this state where the directors hold all their meetings, the officers, residing here, may be compelled by *mandamus* to issue an order to the superintendent to allow a stockholder to inspect the mining property. It was said that under our statutes the

8 Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

9 Symmes v. Sierra etc. Min. Co., 171 Cal. —; 153 Pac. 710.

stockholder is entitled to that right regardless of his motives or the existence of good cause, and at common law also upon his showing good cause.[10]

TRANSFER AGENCIES

§ 586, Civil Code. Any corporation organized in this state for the purpose of mining or carrying on mining operations in or without this state, may establish and maintain agencies in other states of the United States, for the transfer and issuing of their stock; and a transfer or issue of the same at any such transfer agency, in accordance with the provisions of its by-laws, is valid and binding as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this state. The agencies must be governed by the by-laws and the directors of the corporation. (Enacted March 21, 1905; Stats. 1905, p. 584.)

STOCK ISSUED AT TRANSFER AGENCIES

§ 587, Civil Code. All stock of any such corporation, issued at a transfer agency, must be signed by the president and secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency. No stock must be issued at a transfer agency unless the certificate of stock, in lieu of which the same is issued, is at the time surrendered for cancellation. (Enacted March 21, 1905; Stats. 1905, p. 585.)

CONSOLIDATION OF MINING CORPORATIONS

§ 587a, Civil Code. It is lawful for two or more corporations formed, or that may hereafter be formed, under the laws of this state, for mining purposes, which own or possess mining claims or lands adjoining each other, or lying in the same vicinity, to consolidate their

10 Hobbs v. Tom Reed G. M. Co., 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781; Hobbs v. Davis, 168 Cal. 556, 143 Pac. 733.

capital stock, debts, property, assets, and franchises, in such manner and upon such terms as may be agreed upon by the respective boards of directors or trustees of such corporations so desiring to consolidate their interests;

But no such consolidation must take place without the written consent of the stockholders representing two thirds of the capital stock of each corporation,

And no such consolidation can, in any way, relieve such corporations, or the stockholders thereof, from any and all just liabilities;

And in case of such consolidation, due notice of the same must be given, by advertising, for one month, in at least one newspaper in the county where the said mining property is situated, if there is one published therein, and also in one newspaper published in the county where the principal place of business of any of said corporations is.

And when the consolidation is completed, a certificate thereof, containing the manner and terms of such consolidation, must be filed in the office of the county clerk of the county in which the original certificate of incorporation of each of said corporations is filed, and a copy thereof must be filed in the office of the secretary of state;

Such certificate must be signed by a majority of each board of trustees or directors of the original corporations,

And it is their duty to call, within thirty days after the filing of such certificate, a meeting of the stockholders of all of said corporations so consolidated, to elect a board of trustees or directors for the consolidated corporation, for the year thence next ensuing; and to cause notice of the time and place fixed for such meeting to be mailed to each stockholder of each of such corporations at his last known place of residence or business at least ten days before the time fixed for such meeting.

The said certificate must also contain all the requirements prescribed by section two hundred and ninety. (Enacted March 21, 1905; Stats. 1905, p. 585.)

BOOKS AND BALANCE SHEETS TO BE KEPT BY SECRETARY—STOCKHOLDER'S RIGHT TO INSPECT

§ 588, Civil Code. It is the duty of the secretary of every corporation formed for the purpose of mining, or conducting mining in California, whether such corporation be formed and organized under the laws of the state of California or of any other state, territory, or foreign country, to keep at some place within the state of California an office and in such office to keep a complete set of books showing all receipts and expenditures of such corporation, the sources of such receipts, and the objects of such expenditures, and also all transfers of stock.

All books and papers must, at all times during business hours, be open to the inspection of any stockholder. He is entitled to be accompanied by an expert, and to make copies or extracts from any such books or papers.

He may, at reasonable hours, examine such mining property, accompanied by an expert, take samples, and make such other examination as he may deem necessary.

It is the duty of the directors, on the second Monday of each and every month, to cause to be made an itemized account or balance sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and to whom and for what object or purpose such disbursements or payments were made; also all indebtedness or liabilities incurred or existing at the time, and for what the same were incurred, and the balance of money, if any, on hand. Such account or balance sheet must be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company.

It is the duty of the superintendent, on the first Monday of each month, to file with the secretary an itemized

account, verified under oath, showing all receipts and disbursements made by him for the previous month, and for what said disbursements were made. Such account must also contain a verified statement showing the number of men employed under him, and for what purpose, and the rate of wages paid to each. He must attach to such account a full and complete report, under oath, of the work done in said mine, the amount of ore extracted, from what part of mine taken, the amount sent to mill for reduction, its assay value, the amount of bullion received, the amount of bullion shipped to the office of the company or elsewhere, and the amount, if any, retained by the superintendent.

It is his duty to forward to the office of the company a full report, under oath, of all discoveries of ores or mineral-bearing quartz made in said mine, whether by boring, drifting, sinking, or otherwise, together with the assay value thereof.

All accounts, reports, and correspondence from the superintendent must be kept in some conspicuous place in the office of said company, open to the inspection of all stockholders. (Enacted March 21, 1905; Stats. 1905, p. 585.)

RIGHT OF STOCKHOLDERS TO VISIT MINE WITH EXPERT

§ 589, Civil Code. Any stockholder of a corporation formed under the laws of this state for the purpose of mining, is entitled to visit, accompanied by his expert, and examine the mine or mines owned by such corporation, and every part thereof, at any time he may see fit;

And when such stockholder applies to the president of such corporation, he must immediately cause the secretary thereof to issue and deliver to such applicant an order, under the seal of the corporation, directed to the superintendent, commanding him to show and exhibit such parts of said mine or mines as the party named in said order may desire to visit and examine.

It is the duty of the superintendent, on receiving such order, to furnish such stockholder every facility

for making a full and complete inspection of said mine or mines, and of the workings therein, and to accompany said stockholder either in person, or to furnish some person familiar with said mine or mines to accompany him in his visit to and through such mine or mines, and every part thereof.

If the superintendent fails to obey such order, such stockholder is entitled to recover, in any court of competent jurisdiction, against the corporation, the sum of one thousand dollars, and traveling expenses to and from the mine, as liquidated damages, together with costs of suit.

In case of such refusal, it is the duty of the directors of the corporation forthwith to remove the officer so refusing, and thereafter he must not be employed directly or indirectly by the corporation, nor must any salary be paid to him. (Enacted March 21, 1905; Stats. 1905, p. 586.)

LIABILITY OF PRESIDENT AND DIRECTORS

§ 590, Civil Code. In case of the refusal or neglect of the president to cause to be issued by the secretary the order mentioned in section five hundred and eighty-nine, such stockholder is entitled to recover against said president the sum of one thousand dollars and costs, as provided in the last section.

If the directors fail to have the reports and account current made and posted as provided in section five hundred and eighty-eight, they are liable, either severally or jointly, to an action by any stockholder complaining thereof, and on proof of such refusal or failure, he may recover judgment for actual damages sustained by him, with costs of suit.

Each of such defaulting directors is also liable to removal for such neglect. (Enacted March 21, 1905; Stats. 1905, p. 587.)

NEW NAME OF REVIVED COMPANIES

And provided, that in case the name of any corporation which has suffered the forfeiture prescribed in this act, or a name so closely resembling the name of such corporation as will tend to deceive, has been adopted by any other corporation since the date of said forfeiture, then said corporation having suffered such forfeiture shall be relieved therefrom pursuant to the terms of this section only upon the adoption by said corporation seeking revivor of a new name, and in such case nothing in this act contained shall be construed as permitting such corporation to be revived or carry on any business under its former name; and such corporation shall have the right to use its former name or take such new name only upon filing an application therefor with the secretary of state and upon the issuing of a certificate to such corporation by the secretary of state setting forth the right of such corporation to take such new name or use its former name, as the case may be;

LIMITATION ON NAMES

Provided, however, that the secretary of state shall not issue any certificate permitting any corporation to take or use the name of any corporation heretofore organized in this state, and which has not suffered a forfeiture prescribed by this act, or to make or use a name so closely resembling the name of such corporation heretofore organized in this state as will tend to deceive. The provisions of title 9, part 3 of the Code of Civil Procedure, in so far as they conflict with this section, are not applicable to corporations seeking revivor under this act.

ACTION TO COLLECT TAX

The controller may, on or before the thirtieth day of April next following said delinquency and forfeiture, bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people

of the state of California, to collect any delinquent taxes, together with any penalties, or costs, which have not been paid in accordance with the provisions of this act and appearing delinquent upon the record of assessments for state taxes hereinbefore in this act provided for. The attorney general must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.

ATTACHMENT

In such action a writ of attachment may be issued, and no bond or affidavit previous to the issuing of said attachment is required. In the case of companies whose charters or right to do business have been forfeited under the provisions of this act, service of summons may be made upon the persons now provided for by law to be served as agents or officers of any of such companies and such persons shall be deemed to be the agents of such companies for all purposes necessary in order to prosecute such action. Payment of the taxes and penalties, or amount of the judgment recovered in such action must be made to the state treasurer. In such actions the record of assessments for state taxes, or a copy of so much thereof as is applicable in said action, duly certified by the controller, or by the secretary of the state board of equalization, showing unpaid taxes against any company, person or association assessed by the state board of equalization, is prima facie evidence of the assessment upon the property and franchises, the delinquency, the amount of the taxes, penalties, and costs due and unpaid to the state, and that the company, person, or association is indebted to the people of the state of California in the amount of taxes and penalties therein appearing unpaid, and that all forms of law in relation to the assessment and levy of such taxes have been complied with. (Stats. 1913, p. 7.)

or for a commission, if acting either for the investment company or an investment broker.

(*e*) The term "sale," when used in this act, means the original transfer of title of its own securities from an investment company for any valuable consideration.

SEC. 3. This act shall not apply to corporations, associations, copartnerships, companies, firms and individuals now or hereafter subject to the jurisdiction or authority of the railroad commission, nor to corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state, nor to corporations, associations, copartnerships, companies, firms and individuals after they have secured from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state, nor to corporations, associations, copartnerships or companies, subject to federal regulation or not organized for profit, nor to mutual water companies and irrigation districts, nor to the stocks, stock certificates, bonds or other evidences of indebtedness of such corporations, associations, copartnerships, companies, firms or individuals. (Stats. 1915, p. 1135.)

SEC. 4. (*a*) Before selling, offering for sale, negotiating for the sale, or taking subscriptions for, any security of any kind or character, each investment company shall file in the office of the commissioner of corporations of this state, an application for permission so to do, together with a filing fee, as hereinafter prescribed, an itemized statement of its financial condition, in such form and detail as the commissioner of corporations may prescribe, a copy of all contracts which it proposes to make with or sell to the public, a certified copy of its charter, Articles of Incorporation or articles of association and all amendments thereto, and such additional information pertaining thereto as the commissioner of corporations may, from time to time, prescribe. Said filing fee shall be five dollars if the par or face value of said security amounts to twenty-five thousand dollars or less; ten dollars if the par or face value of said security amounts to over twenty-five thousand dollars and not over fifty thousand dollars; fifteen dollars if the par or face value of said security amounts to over fifty

thousand dollars and not over seventy-five thousand dollars; twenty dollars if the par or face value of said security amounts to over seventy-five thousand dollars and not over one hundred thousand dollars; and twenty-five dollars if the par or face value of said security amounts to over one hundred thousand dollars.

(*b*) If the investment company does not desire to sell its securities to the public the commissioner of corporations may make his written finding to that effect. Upon the filing of said finding the investment company and its securities shall be exempt from the provisions of this act until the commissioner of corporations makes and files his order setting aside said finding. The commissioner of corporations shall have power to make his order setting aside said finding if he finds that the investment company is selling its securities to the public, or for other good cause.

(*c*) If such company is organized or created under or by virtue of the laws of any other state, territory or government, it shall also file in the office of the commissioner of corporations a certified copy of the law or laws under which it is organized or incorporated, and all amendments thereto, and also, in such form as the commissioner of corporations may prescribe, its written instrument, irrevocable, appointing the commissioner of corporations or his successor in office its true and lawful attorney, upon whom all process in any action or proceeding against it may be served with the same effect as if said company were organized or created under the laws of this state and had been lawfully served with process therein. Service upon such attorney shall be deemed personal service upon such company. The commissioner of corporations shall forthwith forward by mail, postage prepaid, to the person designated by such company by written instrument filed with the commissioner of corporations at the address given in said instrument, or, in case no such instrument has been filed, to the secretary of such company at its last known post office address, a copy of every process served upon him under the provisions of this section. For each copy of process, the commissioner of corporations shall collect the sum of two dollars, which shall be paid by the plaintiff or moving party at the

time of such service, to be recovered by him as part of his taxable costs, if he succeeds in the suit or proceedings. Service shall not be deemed complete until said fee has been paid, and said copy of process mailed as hereinbefore directed.

SEC. 5. It shall be the duty of the commissioner of corporations to examine the statement and other information so filed, and he may, if he deems it advisable, make, or have made, at applicant's cost as hereinafter in this act specified, a detailed examination, audit and investigation of the investment company's affairs, providing that the investment company may at its option, in writing, refuse to have such examination, audit or investigation made, whereupon the commissioner of corporations must reject the application. If he finds that the proposed plan of business of the investment company is not unfair, unjust, or inequitable the commissioner of corporations shall issue to the investment company a certificate, authorizing it to sell securities, as therein specified within this state, reciting that the company has complied with the provisions of this act, that detailed information concerning the investment company and its securities is on file in the office of the commissioner of corporations and that the investment company is authorized to sell said securities within this state on such conditions, if any, as the commissioner of corporations may in said certificate prescribe. Said certificate shall recite in bold type that the issuance of this certificate is permissive only and does not constitute a recommendation or indorsement of said securities. The commissioner of corporations may impose such conditions as he may deem necessary to the issue of said securities, and may, from time to time, for cause, rescind, alter or amend the certificate. If the commissioner of corporations finds that the proposed plan of business of the investment company is unfair, unjust, or inequitable or that it does not intend to do a fair and honest business, he shall refuse to issue the certificate and shall notify the investment company in writing of his decision. It shall be unlawful to issue any security to which this act is applicable unless a certificate or a temporary permit authorizing the issue thereof shall first have been secured from the commissioner of corporations as provided in this act; and it shall further be unlawful for any investment company, investment broker or agent as in

this act defined, to sell, offer for sale, negotiate for the sale of or take subscriptions for any stock, stock certificate, bond or other evidence of indebtedness of any kind or character without exhibiting to the prospective purchaser or prospective purchasers of such securities, or any thereof, a copy of the certificate issued to such investment company in accordance herewith. A corporation may without applying for a certificate under the provisions of this act issue to each of its directors one share of stock for the purpose of qualifying as directors. The commissioner of corporations, if satisfied that the investment company intends to do a fair, just and equitable business, may, forthwith upon the filing of the statement and other papers required by section four of this act, issue to said investment company, upon such conditions as he may prescribe, a temporary permit to issue its securities pending the examination of said statement and other papers, and may, from time to time, for cause, rescind, alter or amend said temporary permit.

SEC. 6. The provisions of sections four and five of this act, in so far as applicable, shall apply to investment brokers; provided, that the commissioner of corporations may, if he finds that the applicant has a good business reputation and deals only in good securities, issue to an investment broker a general permit entitling such investment broker to sell securities within this state, authorized by him, until the first of March following, when it will be necessary to secure a new general permit. For each such general permit the commissioner of corporations shall charge the sum of five dollars. Such general permit, however, shall be subject to revocation by the commissioner of corporations at any time for cause appearing to him sufficient. The commissioner of corporations shall forthwith mail written notice of such revocation to the investment broker.

SEC. 7. Any investment company or investment broker may appoint one or more agents, but it shall be unlawful for any such agent to do any business as specified in this act until he shall have secured from the commissioner of corporations a certificate authorizing him to represent such investment company or investment broker within this state until the first of

March following, when it will be necessary to secure a new certificate. For each certificate the commissioner of corporations shall charge the sum of one dollar. Such certificate, however, shall be subject to revocation by the commissioner of corporations at any time for cause appearing to him sufficient.

SEC. 8. The commissioner of corporations shall have general supervision and control, as provided in this act, over any and all investment companies and investment brokers, and all such investment companies and investment brokers shall be subject to examination by the commissioner of corporations or a duly authorized deputy at any time the commissioner of corporations may deem it advisable to have such examination made to carry out any provision of this act, and in the same manner and with the same powers as is now, or may hereafter be provided for the examination of state banks. Such investment company or investment broker shall pay to the commissioner of corporations, for each examination, a fee of ten dollars and traveling expenses for each day or fraction thereof that he or his deputy shall necessarily be absent from his office for the purpose of making such examination, and the failure or refusal of any investment company or investment broker to pay such fee upon the demand of the commissioner of corporations shall work a forfeiture of its or his rights to sell any further securities in this state until such fee shall have been paid to the commissioner of corporations, with interest at the rate of seven per cent from the time of the demand of the commissioner of corporations and an additional twenty-five per cent of such fee by way of penalty.

SEC. 9. It shall be unlawful for any investment company, investment broker or agent to issue, circulate or deliver any advertisement, pamphlet, prospectus, circular or statement or other document in regard to securities which it desires to sell in this state until after such investment company, investment broker or agent shall have been licensed to sell such securities as provided in this act. It shall be unlawful for any such licensed investment company, investment broker or agent to issue, circulate or deliver any such advertisement, pamphlet, prospectus, circular, statement or other document, unless the same shall be signed with the name of the investment com-

pany or investment broker and bear a serial number and a copy thereof shall first have been filed with the commissioner of corporations. The commissioner of corporations may for cause object to any such advertisement, pamphlet, prospectus, circular, statement or other document, whereupon it shall be unlawful for such investment company, investment broker or agent to further issue, circulate or deliver such advertisement, pamphlet, prospectus, circular, statement or other document.

SEC. 10. (*a*) Every investment company, until it shall have sold all the securities authorized by the commissioner of corporations and disposed of the proceeds thereof, shall file in the office of the commissioner of corporations, under date of December 31st and June 30th of each year, and within fifteen days after said dates, and also at such other times as may be required by the commissioner of corporations, a report setting forth in such form as the commissioner of corporations may prescribe, the securities authorized by him and sold under the provisions of this act, the proceeds derived therefrom, the disposition of such proceeds and such other information concerning its affairs relating to the subject matter of this act, as the commissioner of corporations may require.

(*b*) Every investment broker shall when called upon by the commissioner of corporations file in his office a report giving such information as he may call for, relating to the securities, the sale of which has been authorized under the provisions of this act.

SEC. 11. All papers, documents, reports and other instruments in writing filed with the commissioner of corporations under this act shall be open to public inspection; provided, that if in his judgment the public welfare or the welfare of any investment company demands that any portion of such information be not made public he may withhold such information from public inspection for such time as in his judgment is necessary.

SEC. 12. An appeal may be taken from any decision of the commissioner of corporations under this act by filing with the clerk of the superior court of the state of California, in and for the city and county of San Francisco, a certified transcript of all papers in the office of the commissioner of corporations

relating to such decision. It shall be the duty of the commissioner of corporations to make and certify to said transcript upon payment to him of a fee of ten cents for each folio and one dollar for the certification. The court shall upon such appeal be limited to a consideration of the question whether there has been abuse of discretion on the part of the commissioner of corporations in making such decision.

SEC. 13. Any person who shall knowingly or wilfully subscribe to or make or cause to be made any false statement or false entry in any book of any investment company or investment broker, or exhibit any false paper with the intention of deceiving any person authorized to examine into its affairs, or who shall make or publish any false or misleading statement of its financial condition or concerning the securities by it offered for sale, shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding one year or by both such fine and imprisonment.

SEC. 14. Any corporation, association, copartnership or company which violates or fails to comply with any of the provisions of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, demand or requirement, or any part or provision thereof, of the commissioner of corporations under the provisions of this act, is subject to a penalty of not less than five hundred dollars, nor more than two thousand dollars for each and every offense, which penalty if unpaid after demand by the commissioner of corporations shall be recovered in an action brought in the name of the people of the state of California by the attorney general.

SEC. 15. Every person who violates or fails to comply with any of the provisions of this act or who fails, omits or neglects to obey, observe or comply with any order, decision, demand or requirement, or any part or provision thereof, of the commissioner of corporations under the provisions of this act in any case in which a different penalty is not specifically provided, is guilty of a misdemeanor and is punishable by a fine of not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

SEC. 16. There is hereby created a state corporation department. The chief officer of such department shall be the commissioner of corporations. He shall be appointed by the governor and hold office at the pleasure of the governor. He shall receive an annual salary of five thousand dollars, to be paid monthly out of the state treasury upon a warrant of the controller. He shall within fifteen days from the time of notice of his appointment take and subscribe to the constitutional oath of office and file the same in the office of the secretary of state and execute to the people of the state a bond in the penal sum of ten thousand dollars with corporate security or two or more securities, to be approved by the governor of the state, for the faithful discharge of the duties of his office.

SEC. 17. The commissioner of corporations shall employ such clerks and deputies as he may need to discharge in proper manner the duties imposed upon him by law. Neither the commissioner of corporations nor any of his clerks or deputies shall be interested in any investment company, or investment broker, as director, stockholder, officer, member, agent or employee. Such clerks and deputies shall perform such duties as the commissioner of corporations shall assign to them. He shall fix the compensation of such clerks and deputies which compensation shall be paid monthly on the certificate of the commissioner of corporations, and on the warrant of the controller out of the state treasury; provided, however, that the total expenditures provided for in this act shall not exceed fifty thousand dollars per annum. Each deputy shall within fifteen days after his appointment take and subscribe to the constitutional oath of office and file the same in the office of the secretary of state.

SEC. 18. The commissioner of corporations shall have his office in the city of Sacramento and he shall from time to time obtain the necessary furniture, stationery, fuel, light and other proper conveniences for the transaction of the business of the state corporation department, the expenses of which shall be paid out of the state treasury on the certificate of the commissioner of corporations and the warrant of the controller.

SEC. 19. A fund is hereby created to be known as the "corporation commission fund" and out of said fund shall be

paid all the expenses incurred in and about the conduct of the business of the corporation department, including the salary of the commissioner and his clerks and deputies, traveling expenses, furnishing rooms and rent. All moneys collected or received by the commissioner of corporations under and by virtue of the provisions of this act shall be delivered by him to the treasurer of the state, who shall deposit the same to the credit of said corporation commission fund. And all such fund so deposited or such part thereof as may be necessary for the purposes of this act are hereby appropriated to the use of the corporation commission fund for the purposes of this act. It shall be the duty of the commissioner of corporations semi-annually to certify under oath to the state treasurer and secretary of state the total amount of receipts and expenditures of the state corporation department for the six months preceding. All fees and payments of every description required by this act to be paid to the commissioner of corporations shall be paid by him to the state treasurer on the first day of each week following their receipt by the commissioner of corporations.

SEC. 20. The commissioner of corporations shall adopt a seal with the words "Commissioner of Corporations, State of California," and such other device as the commissioner of corporations may desire engraved thereon by which he shall authenticate the proceedings of his office. Copies of all records and papers in the office of the corporation department shall be received in evidence of all cases equally and with like effect as the originals.

SEC. 21. Every official report made by the commissioner of corporations and every report, duly verified, of an examination made, shall be *prima facie* evidence of the facts therein stated for all purposes in any action or proceedings wherein any investment company or investment broker is a party.

SEC. 22. If any section, sub-section, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, sub-section, sentence, clause, and phrase thereof irrespective of the fact that

any one or more other sections, sub-sections, sentences, clauses or phrases be declared unconstitutional.

SEC. 23. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 24. The sum of ten thousand dollars is hereby appropriated out of any moneys in the state treasury not otherwise appropriated for the purpose of carrying this act into effect.

SEC. 25. This act shall take effect November 1, 1913.

(This act took effect, under referendum vote, December 19, 1914.)

FORMS

GENERAL OBJECT CLAUSES

The following General and Specific Object Clauses are taken from the very excellent work of Thomas G. Frost on "Incorporations and Organization of Corporations" by the kind permission of the author.

GENERAL TRADING CLAUSE

To manufacture, export, import, buy, sell, and generally deal in goods, wares, merchandise, and property of every class and description.

GENERAL PURCHASING CLAUSE

To purchase, lease, or otherwise acquire all kinds of personal property which the corporation may deem necessary or convenient for the purposes of its business.

REAL ESTATE CLAUSE

To purchase, lease, or otherwise acquire real estate, improved or unimproved, without limit as to amount, in any state or territory of the United States or foreign country.

PATENT AND TRADE MARK CLAUSE

To apply for, acquire, buy, sell, assign, lease, pledge, mortgage, or otherwise dispose of letters patent of the United States or of any foreign country, and all or any rights, territorial or otherwise, thereunder. To apply for, acquire, hold, sell, assign, lease, mortgage, or otherwise dispose of patent rights, licenses, privileges, inventions, trade marks, trade names, and pending applications therefor, relating to or useful in connection with any business of the corporation. To use, manu-

GENERAL OBJECT CLAUSES

facture, or grant licenses under any letters patent owned or controlled by the company, and to expend money in experimenting upon and testing the validity or value of any patent rights the company may acquire or proposes to acquire.

ACQUIRING AN ESTABLISHED BUSINESS

To acquire by purchase or otherwise property, real or personal, and the good will, rights, and assets of all kinds under such terms and conditions as may be deemed advisable, of any person, firm, or corporation, and to pay for the same in cash, stock—common or preferred—bonds, or other securities of the corporation.

HOLDING STOCK IN OTHER CORPORATIONS

To subscribe for, purchase, or otherwise acquire, and hold with the same rights of ownership therein, including the right to vote the same, as may be permitted to natural persons, the shares, bonds, and obligations of any corporation organized under the laws of any state, territory, district, or colony of the United States or of any foreign country.

CONDUCTING BUSINESS IN OTHER STATES

To conduct its business in all its branches, and to have one or more business offices, and without restriction to contract, buy, sell, lease, mortgage, and convey such real and personal property in any of the states, territories, districts, or colonial possessions of the United States and any foreign countries as shall from time to time be found necessary and convenient for the purposes of the company's business.

BOND CLAUSE

To issue bonds to any amount authorized by law for the purpose of securing funds for corporate purposes, and to secure the payment of the same by mortgage or deed of trust upon the whole or any part of the real and personal property of the company at any time held by it.

GENERAL OBJECT CLAUSES

AUTHORIZING THE ISSUANCE OF PROMOTION STOCK

To remunerate any person, firm, or corporation for services rendered or to be rendered in selling, pledging, or guaranteeing the disposal of any of the shares of the capital stock of the company, or of any bonds or other securities of the company that may from time to time be issued.

POWER TO DISPOSE OF ALL CORPORATE PROPERTY

The board of directors shall have the power and authority to sell, assign, mortgage, convey, or otherwise dispose of all the property and assets of the corporation on such terms and conditions as they shall prescribe whether for cash or property or stock and bonds in other corporations.

(I) GENERAL PURPOSE CLAUSE

To do and perform every act and thing necessary to carry out the above enumerated purposes in other states and jurisdictions which like corporations organized under the law of such states and jurisdictions may lawfully do or cause to be done therein.

(II) GENERAL PURPOSE CLAUSE

To foster, protect, and promote the business welfare and interests of persons engaged in the business of..... and its product, and for the protection and encouragement of such business by combining against impositions, fraud, and oppression therein.

(III) GENERAL PURPOSE CLAUSE

To carry on any and all kinds of manufacturing and commercial, mercantile, mechanical, trading, mining, or real estate business.

MISCELLANEOUS GENERAL OBJECT CLAUSE

The objects and purposes for which and for any of which this corporation is formed are, to do any or all of the things

GENERAL OBJECT CLAUSES

herein set forth to the same extent as natural persons might or could do, viz.:

To manufacture, purchase, or otherwise acquire, to hold, own, mortgage, pledge, sell, assign, and transfer, or otherwise dispose of, to invest, trade, deal in and deal with goods, wares, and merchandise, and real and personal property of every class and description; and in particular, lands, buildings, business concerns and undertakings, mortgages, shares, stocks, debentures, securities, concessions, produce, policies, book debts and claims, and any interest in real or personal property, and any claims against such property, or against any person or company, and to carry on any business, concern, or undertaking so acquired.

To acquire the good-will, rights and property, and to undertake the whole or any part of the assets and liabilities, of any person, firm, association, or corporation, and to pay for the same in cash, stock, or bonds of this corporation or otherwise.

To acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage, or otherwise dispose of letters patent of the United States or any foreign country, patents, patent rights, licenses and privileges, inventions, improvements, and processes, trade marks and trade names, relating to or useful in connection with any business of this corporation.

To enter into, make, perform, and carry out contracts of every kind, for any lawful purpose, without limit as to amount, with any person, firm, association, or corporation.

To draw, make, accept, endorse, discount, execute, and issue promissory notes, bills of exchange, warrants, and other negotiable or transferable instruments.

To issue bonds, debentures, or obligations of this corporation from time to time, for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise.

To have one or more offices, to carry on all or any of its operations and business and without restriction or limit as to amount, to purchase or otherwise acquire, to hold, own, to

GENERAL OBJECT CLAUSES

mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, districts, territories, or colonies of the United States, and in any and all foreign countries, subject to the laws of such state, district, territory, colony, or country.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

SPECIAL OBJECT CLAUSES

FORM 1. ADVERTISING

To carry on a general advertising business in all its various branches; to solicit and contract for and give publicity to all kinds of advertising; to prepare, manufacture, construct, and arrange for advertising devices, advertisements, and novelties. To erect, construct, purchase, lease, or otherwise acquire fences, bill-boards, signboards, buildings, and other structures suitable for advertising purposes. To do a general bill-posting, sign-tacking, circularizing, and distributing business of every kind appertaining to any and all kinds of advertising.

FORM 2. AGRICULTURAL IMPLEMENTS

To carry on the business of manufacturers and dealers in agricultural implements; to manufacture, buy, sell, export, import, and generally deal in harvesters, binders, reapers, mowers, harrows, hay racks, headers and shredders, cutters, binding machines, threshers, drillers, seeders, and agricultural tools and implements of all kinds, and such other goods, wares, and merchandise as are usually manufactured or sold, exported or imported, and dealt in by manufacturers and dealers in a similar line of business.

FORM 3. AMUSEMENT COMPANY

To build, buy, lease, or otherwise acquire, own, operate, and maintain merry-go-rounds, loop-the-loops, gravity and pleas-

SPECIAL OBJECT CLAUSES

ure railways, aerial coasting swings, Ferris wheels, and all other devices of a like nature calculated to offer amusement to the public and profit to the company. Also to manufacture, locate, buy, lease, or otherwise acquire, sell, and deal in scenery, stage appliances, theatre appliances, and other articles suitable for use on stage or in amusement enterprises, theatres, or other public places. Also to purchase, own, lease, or otherwise acquire, license, or sell plays, operas, songs, musical or dramatic manuscripts or copyrights whatsoever which may be used as a basis for the amusement or entertainment of persons in public or private places. To carry on the business of, and to do any and all things that may be ordinarily conducted by dramatic and operatic agents and managers of amusement enterprises of any kind, including the manufacture of appliances used in theatrical amusement enterprises. Also to conduct amusement enterprises of all kinds. To purchase, lease, or otherwise acquire, buy, sell, or otherwise dispose of lands and buildings for the erection, operation, and maintenance of theatres, opera houses, and amusement enterprises of every character, with suitable plants, machinery, lighting, and heating apparatus, and other appliances connected therewith.

FORM 4. AUTOMOBILES

To manufacture, buy, sell, import, export, and generally deal in all kinds of vehicles, engines, machines, or appliances for the generation of steam, electric, gasoline, or other power for the purpose of propelling cars, carriages, wagons, trucks, and vehicles of every kind and description; and also to manufacture, buy, sell, import, export, and generally deal in machinery of all kinds and such mechanical devices and engineering appliances as are generally manufactured, bought, sold, exported, imported, and dealt in by manufacturers, and dealers in a similar line of business.

FORM 5. BOOKS

To carry on the business of booksellers, stationers, bookbinders, and engravers, lithographers, publishers, and manu-

SPECIAL OBJECT CLAUSES

facturers of inks and all articles and things of the same character as the foregoing or connected therewith.

FORM 6. BOOTS AND SHOES

To carry on the business of manufacturers and dealers in boots, shoes, and footwear of every kind and description. To manufacture, buy, sell, import, export, and generally deal in boots, shoes, rubbers, soles, lasts, and all kinds of leather, rubber and cloth goods. To manufacture, buy, sell, export, import, and generally deal in all kinds of blacking, polishes, varnishes, lasts, button hooks, fasteners, and such other articles of merchandise as are usually manufactured by manufacturers and dealers in a similar line of business, and machinery of all kinds for the manufacture thereof.

FORM 7. BUILDING CONTRACTORS

To engage generally in the business of contracting for, erecting, decorating, and furnishing thereof, buildings of every class and description. To engage generally in the business of builders, contractors, and dealers in lumber, stone, brick, cement, marble, plumbers' supplies, and all other kinds of building material.

FORM 8. CATTLE

To breed, raise, buy, sell, export, import, and deal in cattle, sheep, horses, and live stock of all classes and descriptions. To build, construct, buy, lease, or otherwise acquire, own, and maintain slaughter-houses. To carry on the business of butchers and packers; also to manufacture, buy, sell, and generally deal in all articles made from the carcasses of animals. To purchase, lease, or otherwise acquire farms and lands suitable for stock raising and agricultural business.

FORM 9. CEMENTS

To manufacture, prepare, buy, sell, import, export, and deal in cement, Portland or otherwise, lime, limestone, and all

kinds of plasters and artificial stone. To build, buy, lease, or otherwise acquire manufactories, plants, buildings, and warehouses suitable for the manufacture, selling, and storing of cement and other products of a similar nature. To manufacture and deal in such other goods, wares, and merchandise as are usually manufactured and dealt in by those engaged in a similar line of business.

FORM 10. CEREALS

To buy, sell, import, export, and generally deal in all kinds of cereals and the manufactured products thereof. To grind material for cereals and the various products thereof. To erect, construct, own, purchase, lease, or otherwise acquire elevators, mills, granaries, and buildings for the storing, handling, manufacturing, and selling of grains and cereals, and the various products thereof. To carry on a general milling and manufacturing business in the preparation of grains, cereals, and other products for market, and to manufacture, buy, sell, import, export, and deal in milling, elevator, and all other machinery for the handling of grains and cereals and their various products and by-products.

FORM 11. CHEMICALS

To manufacture, buy, sell, export, import, and generally deal in all kinds of chemicals, and to carry on the business of chemists, druggists, and manufacturers of, and dealers in pharmaceutical, medicinal, chemical, and other preparations, articles, compounds, pigments, drugs and druggists' sundries, chemical, surgical, and scientific apparatus and machinery. To analyze and refine when necessary all kinds of chemicals, medicines, and preparations. To apply for, obtain, register, purchase, or otherwise acquire, use, operate, sell, assign or otherwise dispose of any and all trade marks, secret processes, trade names, distinctive marks, and all inventions, improvements, and processes used in connection with or secured under letters patent or otherwise, domestic or foreign, and other governmental grants or concessions, and to use and employ

SPECIAL OBJECT CLAUSES

the same in connection with the purposes hereinbefore set forth.

FORM 12. CIGARS

To carry on the business of manufacturers and dealers in cigars and tobacco. To manufacture, buy, sell, exchange, import, export, and generally deal in leaf tobacco, chewing tobacco, cigars, cigarettes, and cheroots; to plant, grow, and treat leaf tobacco, and to manufacture, sell, lease, or otherwise acquire machinery, tools, implements, and appliances incidental and necessary in the cultivation, care, and treatment of leaf tobacco, or in the manufacture of cheroots, chewing and smoking tobacco, cigars and cigarettes. To build, operate, maintain, lease, or otherwise acquire factories, warehouses, and buildings suitable for the curing, storing, preparation, and manufacture of tobacco and its several products.

FORM 13. COLD STORAGE

To preserve in cold storage and generally deal in all kinds of food products of a perishable nature or otherwise. To manufacture, buy, sell, and deal in ice. To buy, sell, store, import, and export fruit, fish, butter, milk, and all kinds of food products, whether animal or vegetable. To operate and maintain stores, buildings, warehouses, depots, and wharves for the carrying on of any of the aforesaid lines of business.

FORM 14. COLONIZATION COMPANY

To buy, sell, lease, or otherwise acquire lands and other property for the purpose of disposing of the same to settlers; to plant, grow, and cultivate tobacco, fruits, sugar, coffee, and all kinds of vegetables; to mine for gold, silver, copper, lead and all kinds of minerals; to manufacture marble, stone, brick, and building materials of a similar nature; to cut, manufacture, buy, sell, and deal in wood and lumber; to build, maintain, and operate hotels, stores, packing-houses, warehouses, elevators, saw-mills, flour-mills, dwellings, stations, and wharves; to raise, buy, sell, and deal in mules, sheep, and horses; to engage in the business of farmers and planters.

SPECIAL OBJECT CLAUSES

FORM 15. COMMISSION MERCHANTS

To engage in the business of selling goods, wares, and merchandise as commission merchants, and as general selling agents; particularly to act as agents or brokers for the selling upon commission or otherwise of the following classes of property, to wit: (here insert description of property to be sold).

FORM 16. DAIRY PRODUCTS

To manufacture, buy, sell, import, export, and generally deal in butter, butter-milk, oleomargarine, and butterine; to buy, sell, and generally deal in milk and all kinds of dairy products; to construct, maintain, and operate refrigerating cars, fast freight lines, and warehouses.

FORM 17. DEPARTMENT STORES

To carry on the business of a general department store; to establish and conduct therein the business of dry-goods merchants, milliners, cloth and fabric manufacturers, furriers, gents' furnishing goods, hosiers, hatters, clothiers, boot and shoe merchants, chemists, druggists, dealers in leather goods, wholesale furniture, silver, china, and glass ware, books, stationery, notions, photographs, pictures, and jewels. To buy, sell, import, export, and generally deal in plated goods, perfumery, toilet articles, bicycles, motor carriages of all kinds, wines, liquors, tobacco, and photographic supplies.

FORM 18. DOCK COMPANY

To construct, erect, and maintain docks, elevators, piers, basins, loading and unloading machines, coal-yards, and all kinds of terminal and transfer facilities for railway or water transportation. Also, to engage in freighting, lighterage, wharfage, and warehousing business. Also, to load and unload cars and vessels of all kinds and descriptions. Also to purchase docking and berthing facilities for steam and sailing vessels of all kinds and descriptions.

SPECIAL OBJECT CLAUSES

FORM 19. DREDGING

To carry on the business of dredging in all its various branches; to buy, sell, manufacture, purchase, lease, or otherwise acquire, own, maintain, and operate docks, scows, lighters, derricks, vessels—steam or otherwise—engines, cars, wagons, tools, and personal property of every class and description convenient or necessary in carrying on the business of dredging.

FORM 20. DRUGS

To manufacture, buy, sell, import, export, and generally deal in all kinds of drugs, druggists' sundries, pharmaceutical, medicinal, chemical, and all other preparations; to manufacture, buy, sell, import, export, and generally deal in compounds, pigments, electrical, medicinal, surgical, and scientific apparatus and proprietary articles of all kinds. To maintain a laboratory for the analysis of all kinds of chemical, animal, and vegetable products.

FORM 21. ELECTRICAL BUSINESS

To carry on the business of electricians, electrical engineers and dealers in electricity, and electric motive power, lighting, and heating. To manufacture, buy, sell, import, export, and generally deal in electrical machinery of all classes and descriptions; also to produce, accumulate, distribute for hire electricity and electro-motive force, and to supply the same for use as power for lighting, heating, and motive purposes; to carry on the business of lighting cities, towns, villages, streets, buildings—public or private—by means of electricity, and to supply light and heating power to carriers of passengers and goods, either by land or water. To construct, build, purchase, lease, or otherwise acquire, maintain, equip, operate, and build street railways, street cars, and other passenger or freight vehicles operated by electricity or otherwise. To manufacture, use, purchase, lease, or otherwise acquire and maintain telephones, telegraphs, phonographs, and all kinds of electrical devices; to construct, operate, and maintain, pur-

SPECIAL OBJECT CLAUSES

chase, lease, or otherwise acquire subways, conduits, electric lighting and heating plants. To lay, construct, and maintain cables, wires, lines, and all necessary appurtenances and appliances.

FORM 22. ELECTRICAL LIGHTING

To manufacture, generate, store, transmit, and distribute electric current for light, heat, and power; to manufacture, buy, sell, import, export, lease, or otherwise acquire and generally deal in machinery, and devices for the manufacture, generation, storage, transmission, and distribution of electric current for light, heat, and power purposes; to erect, buy, sell, lease, or otherwise acquire, operate, and maintain electric lighting, heating, and power plants; to manufacture, buy, sell, lease, or otherwise acquire, import, export, and generally deal in electric apparatus of all kinds; to erect, buy, sell, lease, or otherwise acquire, maintain, and operate underground subways, conduits, poles, string wires, above, upon, or under the streets, alleys, and territories of counties, townships, cities, towns, and villages, whether maintained or owned by public or private corporations or individuals.

FORM 23. FISHERIES

To engage in the business of producing, selling, exporting, importing, and dealing in fish and sea products, nets, lines, and seines, and all kinds of appliances for the catching or preserving of fish. Also to engage in the business of catching, storing, freezing, packing, salting, canning, and otherwise preserving fish. Also to engage in the business of propagating fish and maintaining ponds for that purpose; to construct, purchase, lease, or otherwise acquire, maintain, and operate cold-storage and refrigerator plants and refrigerating cars, and to do a general warehouse and storage business, and in connection therewith to issue registered, certified, and guaranteed warehouse receipts.

SPECIAL OBJECT CLAUSES

FORM 24. FRUIT COMPANY

To buy, sell, import, export, and generally deal in fruits and fruit products. To buy, sell, lease, or otherwise acquire, mortgage, sell, or otherwise dispose of real estate to any amount not limited by law. To engage in the cultivation, planting, and production of fruits and agricultural products. To prepare and manufacture fruit and vegetable products and kindred goods of every class and description.

FORM 25. HARDWARE

To engage in business as jobbers and retailers of hardware of all kinds and descriptions. Also to buy, sell, export, import, and generally deal in railway, steamboat, manufacturers', mill, plumbers', miners', blacksmiths', steam fitters', and gas fitters' supplies. Also to buy, sell, export, import, and generally deal in sheet iron, tools, cutlery, saddlery, and saddlers' goods, round and bar iron, bar and tool steel, guns, and sporting goods of all kinds and descriptions.

FORM 26. HOTEL COMPANY

To build, erect, construct, lease, or otherwise acquire, manage, occupy, maintain, and operate buildings for hotel purposes, dwelling houses, apartment houses, office buildings, and other structures. To buy, own, operate, lease, and occupy lands, buildings for hotels, apartment houses, dwelling houses, office buildings, and business structures of all kinds for the accommodation of the public and of individuals. To keep, manage, conduct, and operate hotels, apartment houses, dwelling houses, restaurants, lunch and tea rooms, barber shops, billiard halls, cafes, and bars, for the accommodation of the public and of individuals.

FORM 27. LAND AND DEVELOPMENT COMPANY

To acquire by purchase, lease, own, hold, sell, mortgage, or encumber both improved or unimproved real estate wherever situated; to survey, subdivide, plat, and improve the same for

purposes of sale or otherwise; also to construct, erect, and operate thereon houses, buildings, light and power plants, machinery, and appliances; to erect, construct, operate, and maintain telegraph and telephone lines; to furnish water power and electricity for power and lighting purposes; to construct, operate, and maintain roadways, tramways, and railways.

FORM 28. MINING (LIMITED POWERS)

To prospect for, locate, acquire by discovery, lease, license, option, purchase, franchise, grant, gift, devise or otherwise, hold, possess, enjoy, develop, mine, work, operate, and exploit mines, mineral lands and claims, mining rights, metalliferous lands and rights in ..... or elsewhere. Also to carry on the business in all its various branches of mining for gold, silver, tin, lead, iron, and coal.

FORM 29. MINING (FULL POWERS)

(To the objects set forth in form 28 add the following:)

To construct, purchase, or otherwise acquire, maintain, and operate tunnels, sluices, reservoirs, and ditches for mining, irrigation, and transportation purposes. Also to purchase, lease, or otherwise acquire lands, mills, mill sites, tunnel sites, buildings, machinery, power houses, pumping plants, pump machinery, dump rights, ditch rights, flumes, pipes, pipe lines, private railways, private tramways, private roads, easements, franchises, and licenses. Also to purchase, construct, lease, or otherwise acquire, operate, and maintain electric lighting and power plants, buildings, machinery, appliances, and equipments appertaining thereto. To purchase, construct, lease, or otherwise acquire, operate, and maintain telegraph and telephone lines for the transmission of messages and sound by electricity. To furnish gas, water, electricity, power, heat, and light for mining, milling, agricultural, domestic, and other uses and purposes, and to sell, lease, or dispose of the same to such persons or corporations, and for such price or prices and on such terms and conditions as to this corporation may

SPECIAL OBJECT CLAUSES

seem proper. To develop, sell, store, contract for, and generally deal in and dispose of to such persons or corporations, and for such price or prices and on such terms and conditions as to this corporation may seem proper, electrical and other power for the generation, distribution, and supply of electricity for mining, heating, and power purposes. To purchase, lease, or otherwise acquire, construct, and maintain plants for the purpose of extracting values from refractory ores. To purchase, treat, refine, extract, reduce, crush, calcine, smelt, concentrate, and manipulate all kinds of ores, minerals, and metalliferous substances with a view to obtaining therefrom gold, silver, tin, lead, copper, iron, and other metals, combination of metals, or other valuable substances with a view to preparing the same for market. Generally to engage in smelting, reducing, crushing, refining, milling, treating, assaying, and selling minerals and ores of all kinds, classes, and descriptions. To buy, sell, manufacture, and generally deal in machinery, blasting powder, and high explosives of every description, fuses, caps, implements, candles, and conveniences suitable for use in connection with mining and metallurgical operations. To purchase, lease, or otherwise acquire lands for the purpose of erecting thereon office buildings, plants, workshops, dwelling houses, warehouses, stores, hotels, and other buildings in connection with the foregoing purposes.

FORM 30. OIL AND PETROLEUM

To locate, purchase, lease, or otherwise acquire lands, mines, mineral claims, water rights and franchises, mill sites, timber lands, limestone quarries, and particularly lands containing or believed to contain petroleum and other oil springs and deposits; to carry on the business of searching for, prospecting, preparing, producing, refining, piping, storing, transporting, supplying, buying, selling, manufacturing, and distributing petroleum and other oils and their products and by-products. To construct, build, operate, and maintain oil wells, refineries, buildings, machinery, plants, stores and warehouses. To handle, store, transport, and prepare for market oils and oil products and by-products, and to erect, maintain,

SPECIAL OBJECT CLAUSES

and operate refineries, mills, works, laboratories, workshops, and dwelling houses for workmen and others. To search for, prospect, examine, refine, smelt, reduce, crush, concentrate, manipulate, and treat gold, silver, lead, copper, iron, and minerals of every class and description. To manufacture, buy, sell, import, export, and generally deal in machinery, pumps, drills, fuses, caps, candles, implements, and conveniences suitable for use in connection with the oil or mining business.

FORM 31. PATENTS

To establish, conduct, and carry on the business of buying, selling, and otherwise dealing in improvements, trade marks, trade names, and any letters patent, registration, or grants, both domestic and foreign, whether issued by the United States or any foreign country or government. To apply for, procure, and obtain any and all necessary letters patent or grants, both foreign and domestic, for all inventions, improvements, and secret processes for the account and in the name of the corporation, or as the agent for any person, firm, or corporation. To exploit and develop any and all such inventions, improvements, trade marks, and processes by establishing in this or any foreign country any and all necessary plants, factories, and machinery for the manufacture of patent articles of any class, nature, or description.

FORM 32. REALTY

To buy, sell, exchange, and generally deal in real properties, improved and unimproved, office buildings, store buildings, dwelling houses, barns, wharves, water rights and privileges; to build, construct, operate, maintain, lease, and sell dwelling houses, apartment houses, and business blocks of all kinds and description. To maintain a general real estate agency and broker's business, including the right to manage estates, to act as agent, broker, or attorney in fact for any person or corporation; to make and obtain loans upon real estate, improved or unimproved, and to supervise, manage, and protect such property and loans, and all interests and claims

SPECIAL OBJECT CLAUSES

affecting the same; to have the same insured against fire and other casualties; to investigate the credit, financial solvency and sufficiency of borrowers, mortgagors, and sureties upon bonds, mortgages, and undertakings. To improve, manage, operate, sell, mortgage, lease, or otherwise dispose of any property, real or personal, and take mortgages and assignments of mortgages upon the same.

FORM 33. REFINERIES

To buy, lease, or otherwise acquire lands containing or believed to contain petroleum, natural gas, oil springs, or mineral deposits; to carry on the business of producing, refining, storing, supplying, and distributing petroleum products of all classes and description; to refine, store, distribute, and sell vegetable and mineral oils; to purchase or otherwise acquire, lease, construct, operate, and maintain refineries, mill works, laboratories, pipe lines, storage tanks, dwelling houses for workmen and others in connection with the purposes hereinbefore set forth.

FORM 34. STOCKBROKERS

To buy, sell, negotiate, exchange, pledge, trade, and deal in and with shares, stocks, debentures, scrip, bonds, and securities of any government, state, or public or private corporation or any corporate body; to trade and deal in and with real estate, mines, metals, minerals, and oil, cotton, grain, produce, or other commodities; to invest in any or either of the foregoing, and from time to time to change the investments of the company; to mortgage, pledge, or otherwise change all or any part of the investments of the company or its property and rights; to make advances on, sell or dispose of, any property or investments, or to act as agent, factor, or broker for any or either of the corporate purposes. To purchase or otherwise acquire the capital stock, shares, debentures, scrip, bonds, or other evidences of indebtedness of any other corporation, and to issue in exchange its own stock, shares, bonds, debentures, scrip, or other evidences of indebtedness in payment therefor,

SPECIAL OBJECT CLAUSES

and, while the owner thereof, to exercise all the rights of ownership, including the power to vote upon such stock or shares. To purchase, receive, hold, and own mortgages, debentures, shares, and other securities or obligations of any public, private, or municipal corporation, or bonds or other securities or obligations of the government of the United States, or of any state, district, territory, colony, or dependency of the United States or any foreign country, state, or colony; to collect and receive, disburse and dispose of, all interest, dividends, accumulations, earnings, and income from, upon, or on account of any bonds, debentures, stocks, shares, securities, contracts, evidences of indebtedness, obligations, or other property held or owned by the corporation therein; to do any and all lawful acts tending to increase or enhance the value of the property of the company.

To issue stock, shares, bonds, debentures, certificates, scrip, or other corporate obligations and to secure the payment thereof by mortgage, pledge, or deed of trust of or upon the whole or any portion of the corporate property or funds; to sell, pledge, or otherwise dispose of bonds, debentures, or other corporate obligations for proper and lawful purposes, as and when the board of directors shall deem necessary, advisable, or expedient; to promote the corporate business of investment and dealing in securities in all lawful ways; and to receive, collect, transmit, pay out, and disburse funds in the course of its business; and to the extent authorized by law to lease, purchase, or otherwise acquire, hold, use, sell, trade, and deal in and with, assign, pledge, mortgage, transfer, and convey real and personal property of any name or nature; to issue and accept drafts, bills of exchange, promissory notes, scrip, drafts, acceptances, or other corporate obligations and negotiate the same.

FORM 35. THEATERS

To construct, purchase, lease, or otherwise acquire theaters, concert halls, and amusement places of all kinds and descriptions. Also to carry on the business of theatrical proprietors, and music hall proprietors. Also to manage theatrical, con-

cert hall, and vaudeville companies of all kinds, classes, and description. Also to engage and employ actors, singers, dancers, athletic, theatrical, and musical artists of all kinds. Also to purchase, own, produce, and present, and to license others to produce and present, theatrical plays, operas, and exhibitions of various kinds.

FORM 36. WAREHOUSES

To carry on the business of warehousing in all of its branches; to receive on consignment or otherwise, to store, sell, and distribute goods on commission or other basis; to export, import, and otherwise deal in goods, wares, and merchandise of all classes and description; to issue warehouse receipts, certificates, and circulars, negotiable or otherwise, to persons warehousing goods, wares, or merchandise with the company; to make advances on loans by way of mortgage, pledge, or deposit of warehouse receipts upon the security of the goods, wares, or merchandise stored with the company or otherwise.

FORM 37. WATER, LIGHT, POWER, AND TRACTION COMPANY

To purchase, acquire, hold, lease, manage, control, and operate, and to sell, lease, and dispose of to such person or persons, corporation or corporations, and for such price or prices, and on such terms and conditions, as to this corporation may seem proper, water, water rights, power, privileges and appropriations, for mining, milling, agricultural, domestic, and other uses and purposes; and to develop, control, generally deal in, and dispose of to such person or persons, corporation or corporations, and for such price or prices, and on such terms and conditions as to this corporation may seem proper, electrical and other power for the generation, distribution, and supply of electricity for light and heat, and for any other uses and purposes to which the same are adapted. To acquire, construct, own, enlarge, maintain, and operate water works, and to supply municipalities and corporations with water and water power, and to acquire, erect, maintain, construct, and

SPECIAL OBJECT CLAUSES

enlarge all necessary dams, buildings, plant, machinery, fixtures, and apparatus of every sort for supplying municipalities, corporations, and individuals with water and water power for all purposes, and to carry on the business incidental thereto, including the purpose of acquiring, constructing, enlarging, maintaining, and operating water works, pumping stations, light and power plants, in any city or town in any state of the United States, the District of Columbia, or in any part of the world. To carry on the business of electricians, mechanical engineers, manufacturers, workers, and dealers in electricity, motive power, heat, and light, and any business in which the application of electricity or any power, like or otherwise, is or may be useful, convenient, or ornamental, or any other business of a like nature, and to manufacture and produce, trade, and deal in and deal with any article belonging to any such business, and all apparatus, appliances, and things used in connection therewith, or with any invention or patents; to produce and accumulate electricity and electromotive force, or other agency, similar or otherwise, and to supply the same for the production, transmission, or use of power for lighting, heating, and motive purposes or otherwise as may be thought advisable; to construct, maintain, and operate works for the supply and distribution of electricity for light, heat, and power; to acquire by purchase or otherwise, to use, operate, and equip subways, conduits, and ducts, and to obtain, accept, and use all permits, and also franchises, municipal or otherwise; to purchase or otherwise acquire and to sell, work, or otherwise deal with land, water, water power, water power supplies, equipment, and works; to undertake, construct, acquire, and carry on works of all kinds relating to any business of the company, and to enter into such contracts and make such arrangements as may be necessary to carry out the same.

CORPORATIONS WITHOUT CAPITAL STOCK

Articles of Incorporation

OF THE

.....

We, the undersigned, a majority of whom are residents of the State of California, do hereby voluntarily associate ourselves together for the purpose of incorporating a non-profit co-operative corporation under the laws of the State of California.

AND WE DO HEREBY CERTIFY,

First: That the name of said corporation is.....

.....

Second: That the purposes for which said corporation is formed are .....

.....

.....

Third: That the place where the principal business of said corporation is to be transacted is.....

.....

Fourth: That the term for which said corporation is to exist is.....,years, from and after the date of its incorporation.

Fifth: That the number of directors of said corporation shall be....., and the names and residences of the directors who are appointed for the first year, and to serve until the election and qualification of their successors, are as follows, to-wit: [Not less than three nor more than fifty].

NAMES	RESIDENCES
.....	.....
.....	.....
.....	.....

Sixth: The voting power and the property rights and interest of each member shall be equal [or if unequal set forth the terms thereof, see Civil Code, sec. 653V].

ARTICLES OF INCORPORATION

IN WITNESS WHEREOF, we, being original members of said association, have hereunto set our hands and seals, this .....day of....., A. D. .....

.....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]

[Must be signed by three or more.]

SIGNED AND SEALED IN THE PRESENCE OF:

.....
.....
.....

STATE OF CALIFORNIA, }
COUNTY OF..... } ss

On this.....day of....., A. D.....
before me,....., a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared.....
.....
known to me to be the person..... whose name..... subscribed to the foregoing instrument, and.....duly acknowledged to me that.....executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in said county, the day and year in this certificate last above written.

[SEAL] .....

Notary Public in and for the County of ....., *State of California.*

CORPORATIONS WITH CAPITAL STOCK

Articles of Incorporation

OF THE

.....

We, the undersigned, a majority of whom are citizens and residents of the State of California, do hereby voluntarily associate ourselves for the purpose of forming a private corporation under the laws of the State of California.

And we hereby set forth, declare and certify, that

FIRST: The name of said corporation is

[a].....

SECOND: The purposes for which said corporation is formed are

[b].....

THIRD: The place where its principal business is to be transacted is

.....

FOURTH: The term for which said corporation is to exist is.....[c] years from and after the date of its incorporation.

FIFTH: The number of directors or trustees of said corporation shall be.....[d], and the names and residences of those who are hereby appointed for the first year are as follows:

Names	Whose residence is in or at
.....	.....
.....	.....
.....	.....

[a] The word "The" before the substantive part of the name should usually be omitted for it seldom serves any useful purpose, and it is a constant annoyance in its business affairs and papers.

[b] Begin every paragraph of the purposes with the infinitive form of the verb, e. g.: "To carry on"; "To deal in," etc.

[c] This term can not exceed fifty years.

[d] They may be any number, not less than three.

ARTICLES OF INCORPORATION

SIXTH: The amount of the capital stock of said corporation is.....dollars, and the number of shares into which it is divided is.....of the par value of $.....each [f].

SEVENTH: The amount of said capital stock which has been actually subscribed [g] is.....dollars, and the following are the names of the persons by whom the same has been subscribed, to-wit:

Names of Subscribers	Number of Shares Subscribed	Amount in Dollars
.....	.....	.....
.....	.....	.....
.....	.....	.....

IN WITNESS WHEREOF, we have hereunto set our hands and seals this.....day of....., 19....

.....[SEAL]

.....[SEAL]

.....[SEAL]

[h]

[f] If there is to be preferred stock add to the above "which shares are further divided into.....shares of common stock, and.....shares of preferred stock." Civil Code, section 290, requires both the common and preferred shares to be of the same par value, therefore the first clause should state the total capital and total shares without distinction, at that point. There should follow a statement of the terms of the preference, a form for which will follow this general form.

If it is desired to make the stock non-assessable add the following clause: "Each share of the capital stock, whether common or preferred, of said company, when issued as full paid, shall be forever non-assessable."

[g] If there is also a preferred stock, the subscriptions should state clearly whether they are made for the common or the preferred; or, if for both, the exact number of shares of each subscribed for.

[h] Each director, so appointed, must sign and acknowledge this instrument; Civil Code, section 292.

ARTICLES OF INCORPORATION

STATE OF CALIFORNIA,
CITY AND COUNTY OF..... } ss.

On this.....day of.....19...., before me,....., a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared.....
.....
known to me to be the persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in said County (or City and County), the day and year in this certificate last above written.

.....
Notary Public in and for the County (or City and County) of.....,
California. My commission expires
.....19.....

PREFERRED STOCK

In framing this clause, it should be borne in mind that no distinction as to voting power, or the par value of the shares, or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation, can be made between the common and preferred stock or shares.

The kinds of preference at times desired are so various that no attempt will be made to give more than a simple form, being the one, or its equivalent, which is most commonly used.

Preferred Stock Clause

The holders of preferred stock shall be entitled to non-cumulative (or cumulative, if so intended) dividends thereon

PREFERRED STOCK CLAUSE

at the rate of.....per cent for each and every fiscal year of the company, payable out of any and all surplus or net profits of the company (annually, semi-annually, or quarterly) on such dates as may be fixed by the board of directors. In the event of the dissolution or liquidation of the corporation, the holders of the preferred stock shall be entitled to receive the par value of their preferred shares (if the stock is cumulative as to dividends, add here "both the par value of their shares and the unpaid dividends accrued thereon") before anything shall be paid thereon to the holders of the common stock. These rights and preference of the preferred stock shall not be altered, amended, or rescinded without the consent of all the holders thereof.

Clauses may be added to the effect that the preferred stock shall never be increased (although such a clause may sometimes turn out to be very undesirable) or never increased without the unanimous consent of all the preferred stockholders; or a clause giving the right of conversion of common stock into preferred stock, or *vice versa;* and it is probable, though not free from doubt, that the holder of preferred stock may be given the right, at certain times, on certain conditions and terms, to demand its redemption by the company, and, possibly, that a right may be given to the company, at its election, to redeem and cancel such stock.

Amending Articles

The Articles may be amended in the following particulars (Civil Code, section 362), but most of these changes must have already been made by certain legal proceedings before the Articles may be amended, as will be seen:

First—To set forth a new name.

AMENDING ARTICLES

But the name can be changed only by the superior court (Code of Civil Procedure, sections 1275-1279). After the decree of the court nothing further is required except to file a certified copy of the decree with the secretary of state, and in the counties mentioned; hence it is not necessary to amend the Articles in this respect.

Second—To alter or repeal provisions relative to the purposes and powers. The proper and only way to accomplish these results is by amending the Articles.

Third—To change the principal place of business. This can not be accomplished by amending the Articles; it can be done only by following the provisions of Civil Code, section 321a. Amending the Articles is not necessary to make the change valid.

Fourth—To state the date to which the term of existence has been extended. Such extension can not be accomplished by amendment of the Articles; this may be done only by complying with the provisions of article 12, section 7, of the constitution, or with those of the Civil Code, section 401. No amendment of the Articles is necessary to make such extension valid.

The term of existence can no longer be shortened by amending the Articles, as could have been done under this section as it formerly stood, as decided in Tognazzini v. Jordan, 165 Cal. 13; in 1915 the legislature amended this section (Civil Code, section 362), prohibiting such an amendment.

Fifth—To state the number of directors as increased or diminished. But the number of directors can not be increased or diminished by amending the Articles; the provisions of Civil Code, section 361, a new section adopted in 1915, must be followed. No amendment of the Articles is necessary to make such a change valid.

AMENDING ARTICLES

Sixth—To increase or diminish the capital; and

Seventh—This can not be done by amending the Articles, but only by complying with the provisions of Civil Code, section 359; if done in accordance with that section no amendment of the Articles is necessary.

CHANGING PAR VALUE AND NUMBER OF SHARES

The only method of accomplishing this is by amending the Articles under Civil Code, section 362. But in doing either of these things the total capital stock must be neither increased nor diminished.

CHANGING TERMS OF PREFERENCE OF PREFERRED STOCK

This can be done only by amending the Articles under the provisions of Civil Code, section 362.

CHANGING ITS CAPITAL STOCK BY CLASSIFICATION THEREOF INTO COMMON AND PREFERRED SHARES

This is accomplished only by amending the Articles under Civil Code, section 362.

If the capital stock consists only of common stock, it may be subdivided into common and preferred shares by amending the Articles, California etc. v. Jordan, 19 Cal. App. 536. If it already consists of common and preferred shares, by the same process of reasoning (but not decided), an amendment of the Articles may increase the preferred shares by equally diminishing the common shares, or *vice versa*. The statute defining the assent to be given to an amendment does not expressly require the assent of two-thirds of each kind of the stocks, but simply of "the holders of at least two-thirds of the subscribed capital stock of such corporation."

AMENDING ARTICLES

Eighth—To provide any other change not contrary to law.

Under this clause any other thing may be inserted by amendment which could have been included in the original Articles, like making the stock non-assessable, etc.

MANNER

The board of directors, by a majority vote, must approve the proposed amendments.

Resolution of Directors

On motion duly made, considered, and put to vote, A, B, and C voting in the affirmative, and D (or no one) voting in the negative, the following resolution was duly adopted,

RESOLVED that paragraph.....of the Articles of Incorporation of this corporation be amended to read as follows:

(Here insert the paragraph as amended.)

A separate document should be signed by the holders of at least two-thirds of the subscribed capital stock of the corporation, and may be as follows:

Assent of Stockholders to Amendment of Articles

Assent of stockholders of.....
....., a corporation, to the amendment of the Articles of Incorporation of said corporation.

We, the undersigned, being the holders of at least two-thirds of the subscribed capital stock of said corporation, do hereby assent to the amendment of the Articles of Incorporation of said corporation as heretofore resolved by the board of direc-

ASSENT OF STOCKHOLDERS

tors of said corporation in a resolution of which the following is a copy, to-wit:

(Here copy the resolution of the directors in full, including the paragraphs as amended, which must be part of said resolution.)

having hereunto subscribed our respective names and opposite our names, respectively, each has written the number of shares of the subscribed capital stock of said corporation held by such subscriber.

NAMES	SHARES HELD
.....	.....
.....	.....
.....	.....

Another method of proceeding contemplates a stockholders' meeting, at which a vote of two-thirds of the holders of the subscribed stock, shall assent to the proposed amendment. This method, being tedious and cumbersome, is seldom adopted. The usual method is to obtain the written assent of the necessary number of shareholders, and, since the amendment of 1915, this assent should be attached to the Articles as amended—no other assent or proceeding being necessary, so far as the stockholders are concerned.

The original document, being the amended Articles in full, having attached thereto the signatures of the necessary stockholders assenting to the same, is kept as part of the records of the corporation.

Copies thereof, certified in the manner provided by Civil Code, section 362, are then filed in the several places required by that section.

Copy of Amended Articles

OF

[a] .....

We, the undersigned, etc. (identically the same as in the original).

FIRST—The name of the corporation is

(Here give new name, if Articles are so amended, otherwise the old name.)

SECOND—The purposes for which said corporation is formed are (here state same in full as amended; if not amended copy original).

THIRD—The place where its principal business is to be transacted is (here state new place if amended, otherwise repeat original articles).

FOURTH—(If amended insert the amendment, if not amended copy the old.)

FIFTH—The number of directors, etc. (If amended, fill the blank space with the proper number, and, as the remainder of this clause can not be changed, copy the names and addresses of the original directors. Bear in mind that the statute, Civil Code, section 361, while requiring this "new number" of directors to be inserted, does not authorize the naming of the new directors or the fixing of their term for one year, or any other period, thereafter. The new directors are elected as directors are usually elected.)

SIXTH—(If amended, copy in full as amended; otherwise copy the original.)

SEVENTH—(This section can not be changed; copy the original in full.)

IN WITNESS, etc. (Copy the original in full, including the original signatures; no change of this can be made.)

ACKNOWLEDGMENT. (This part of the old Articles should not be copied. California etc. v. Jordan, 19 Cal. App. 536.

[a] If the amendment consists of a change of name of the corporation still the old name should be written in this blank space, followed by the words "whose name now is....."

AMENDED ARTICLES

The amended Articles are not acknowledged, but certified in the manner prescribed.)

We, A. B., president, and a director, and C. D. and E. F., directors, of....., the corporation aforesaid, and being a majority of the directors thereof, and G. H., secretary of the said corporation, do hereby certify that we respectively are such president, directors and secretary, as aforesaid; that the foregoing is a full, true and correct copy of said Articles of Incorporation as amended by the board of directors and the holders of more than two-thirds of the subscribed capital stock of said corporation in and by the following proceedings had and done by them; that a meeting of the board of directors of said corporation was duly held at the office and principal place of business of said corporation at No.....street, in the city of....., State of California, on the.....day of....., 19.....; that on said day the directors of said corporation consisted of A. B., C. D. and E. F.; that at said meeting there were present A. B., C. D. and E. F., being (all or) a majority of all the directors of said corporation; that at said meeting a resolution was regularly proposed, voted upon, and duly adopted by the affirmative vote of all (or a majority) of said directors present at said meeting as follows:

(Here copy the foregoing resolution in full, including the amendments proposed to be made.)

that the holders of two-thirds (or more as the case may be) of the subscribed capital stock of said corporation executed, and filed with the secretary of said corporation, their written assent to the amendment of the Articles of Incorporation in the manner and form above set forth, by the due execution of a writing of which the following is a copy, to-wit:

Assent of stockholders of.....
....., a corporation, to the amendment of the Articles of Incorporation of said corporation.

We, the undersigned, being the holders of at least two-thirds of the subscribed capital stock of said corporation, do hereby

AMENDED ARTICLES

assent to the amendment of the Articles of Incorporation of said corporation as heretofore resolved by the board of directors of said corporation in a resolution of which the following is a copy, to-wit:

(Here copy the resolution of the directors in full, including the paragraph as amended which is a part of said resolution) having hereunto subscribed our respective names and opposite our names, respectively, each has written the number of shares of the subscribed capital stock of said corporation held by such subscriber.

NAMES	SHARES HELD
.....	.....
.....	.....
.....	.....

IN WITNESS WHEREOF, we have hereunto set our hands and affixed the corporate seal of said corporation, this ..... day of....., 19....

A. B., President and Director,
(SEAL) C. D., Director
E. F., Director,
G. H., Secretary,

of said.....

[The law does not require this certificate to be acknowledged, but it is good practice to have it done.]

STATE OF CALIFORNIA,
(CITY AND) COUNTY OF..... } ss.

On this.....day of....., 19....., before me, ..., a notary public in and for said (City and) County, personally appeared A. B., personally known to me to be the president and a director, and C. D., and E. F., personally known to me to be directors, and G. H., personally known to me to be the secretary, respectively, of the corporation named in the foregoing instrument and who

EXTENSION OF EXISTENCE

executed the same, and who executed the same in behalf of said corporation, and they acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said (city and) county and state the day and year last above written.

.....

Notary Public, etc.

FAILURE TO FILE COPIES OF AMENDED ARTICLES

The same penalty is imposed for such failure as provided in Civil Code, section 299, for failure to file copies of the Articles of Incorporation in counties where it holds property.

Certificate of Extension of Corporate Existence Under Section 7, Article XII, Constitution

We, the undersigned, president and secretary, and we, the undersigned, a majority of the directors of the..... do hereby certify:

That the.....is a corporation incorporated on the.....day of....., A. D. ....., for a period of.....years, and formed under the laws of the state of California, and is still existing;

That at a (regular meeting) (called meeting) of the stockholders of said corporation (called for the express purpose of considering the subject of the extension of its corporate existence) held on the.....day of....., A. D. .....at the office or principal place of business of said corporation at.....in said state, at which meeting (stockholders representing two-thirds of the capital stock) (two-thirds of the members) of said corporation were

EXTENSION OF EXISTENCE

present and voted, said stockholders and said corporation then and there, by the affirmative vote of (stockholders representing two-thirds of the capital stock) (two-thirds of the members) of said corporation did then and there resolve to extend the existence of said corporation, the....., under the provisions of section 7, article XII, of the constitution of the state of California, for a period of..... years from and after the.....day of....., A. D. .....

IN WITNESS WHEREOF, we, the said president and said secretary, and we, the said directors of said corporation, have hereunto set our hands and affixed the seal of said corporation, this.....day of....., A. D.....

.....

(CORPORATE SEAL) President of said corporation.

.....

Secretary of said corporation.

Approved:

.....

.....

.....

.....

.....

Members of the board of directors of said corporation, and a majority thereof.

STATE OF CALIFORNIA,
(CITY AND) COUNTY OF..... } ss.

On this.....day of....., A. D....., before me, ..., a notary public in and for the said (city and) county of....., State of California, residing therein, duly commissioned and sworn, personally appeared..... known to me to be the president of..... a corporation described in the within and annexed instrument, whose name is subscribed to said instrument as such president, and....., known to me to be the

EXTENSION OF EXISTENCE

secretary of said....., whose name is subscribed to said instrument as such secretary, and they severally acknowledged to me that they executed said instrument as president and secretary respectively of said corporation; and on the same day personally appeared before me, ...
.....
known to me to be the directors of said.....
and to be and to constitute a majority of the directors of said corporation, whose names are subscribed to said instrument as such directors, and as a majority thereof, and they severally acknowledged to me that they executed said instrument as directors of said.....

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the (city and) county of ....., State of California, the day and year in this certificate last above written.

(SEAL) .....
Notary Public in and for the (city and) county of....., state of California.

Certificate of Extension of Term of Corporate Existence

Under Section 401 of the Civil Code

At a meeting of the stockholders of.....
a corporation, held on the.....day of.....,
A. D....., at the principal place of business of said corporation at....., (city and) county of
....., state of California (said meeting having been expressly called by the directors of said corporation for considering the subject of extending the term of the corporate existence of said corporation), the following resolution, to-wit:

EXTENSION OF EXISTENCE

RESOLVED, That the..... hereby extends the term of its corporate existence from .....years, the period set forth in its original Articles of Incorporation, to the period of..... years from its formation,

was offered by....., seconded by ....., and was thereafterwards voted upon by the stockholders present at said meeting, and was voted for by (stockholders representing two-thirds of the capital stock) (two-thirds of the members) of said corporation and was carried; and we hereby certify that the foregoing is a full, true and correct statement of the proceedings of the said meeting upon such vote upon said resolution.

.....
(CORPORATE SEAL) Chairman of said meeting.

.....
Secretary of said meeting.

Approved:

.....
.....
.....
.....
.....

Members of the board of directors of said corporation and a majority thereof.

STATE OF CALIFORNIA,
(CITY AND) COUNTY OF..... } ss.

On this.....day of....., A. D....., before me, ..., a notary public in and for the said (city and) county of....., State of California, residing therein, duly commissioned and sworn, personally appeared....., known to me to be the chairman of the meeting of the stockholders of....., a corporation, held on the.....day of....., A. D....., as described in the within and annexed instrument, whose name is subscribed to said instrument as such

chairman, and....., known to me to be the secretary of said meeting of said stockholders of said company, whose name is subscribed to said instrument as such secretary, and they severally acknowledged to me that they executed said instrument as such chairman and secretary respectively of said meeting of stockholders of said corporation; and on the same day personally appeared before me,

.....

.....

known to me to be directors of said....., and to be and to constitute a majority of the directors of said corporation, whose names are subscribed to said instrument as such directors, and as a majority thereof, and they severally acknowledged to me that they executed said instrument as directors of said.....

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the (city and) county of ....., state of California, the day and year in this certificate last above written.

(SEAL) .....

Notary Public in and for the (city and) county of....., state of California.

Increasing or Diminishing Directors

CONSENT OF STOCKHOLDERS TO INCREASE (OR DIMINISH) THE NUMBER OF DIRECTORS

OF THE.....A CORPORATION

WHEREAS, the.....is a corporation organized and existing under the laws of the state of California, and the total subscribed capital stock thereof consists of.....shares, of the par value of $.....each; NOW, THEREFORE,

We, the undersigned, representing a majority of the subscribed capital stock of said corporation, do hereby give our

INCREASE OR DECREASE OF DIRECTORS

written assent that the number of directors of said corporation be increased (or diminished) from.....to....., and hereby declare and order that from and after the..... day of....., A. D....., the board of directors of said corporation shall consist of..... persons, and hereby certify that we each, respectively, are the owners of the number of shares of the subscribed capital stock of said corporation set opposite our respective signatures below to this instrument.

Dated at.....this.....day of....., A. D. .....

Name of Subscriber	Shares Held	Amount Thereof
.....	.....	.....
.....	.....	.....
.....	.....	.....

CERTIFICATE OF INCREASE (OR DECREASE) OF THE NUMBER OF DIRECTORS OF.....
A CORPORATION

I, ..., the president, and I, ..., the secretary of the ....., a corporation organized and existing under the laws of the state of California, do hereby over the corporate seal of said corporation certify that stockholders representing a majority of the subscribed capital stock of said corporation duly executed the following written assent, to-wit:

(Here insert the assent and signatures in full.)

And that said written assent is on file in the office of said corporation.

And we each hereby further certify that from and after said .....day of....., A. D....., the

REMOVAL OF OFFICE

number of directors of said corporation shall consist of..... persons.

IN WITNESS WHEREOF, we, the president and the secretary, respectively, of said corporation have hereunto set our hands and affixed hereunto the corporate seal of said corporation, this.....day of....., A. D.....

.....President,

(CORPORATE SEAL) and

.....Secretary,

of .....

[This certificate must be filed in the office of the county clerk of the county where its original Articles were filed, and a certified copy thereof with the secretary of state. See Civil Code, section 361.]

Removal of Office and Principal Place of Business

(Civil Code, section 321a.)

No consent of stockholders, or publication of notice of change of place of office, etc., is necessary, when such change is only from one location to another in the same city, town or village; but such consent is necessary when the change is to another location in the same county, or to another county in the state.

CONSENT OF STOCKHOLDERS TO A CHANGE OF THE OFFICE AND PRINCIPAL PLACE OF BUSINESS OF

.....A CORPORATION

WHEREAS, the.....
is a corporation, organized and existing under the laws of the state of California, and the total capital stock of said corporation consists of.....shares, of the par value of $..... each; NOW, THEREFORE,

We, the undersigned, being the holders of more than two-thirds of the capital stock of said corporation do hereby give our consent in writing to the removal of the office and principal

REMOVAL OF OFFICE

place of business of said corporation from..... to.....and hereby certify that we each, respectively, are the holders of the number of shares of the capital stock of said corporation set opposite our respective signatures below to this instrument.

Dated at.....this.....day of..... A. D.....

Name of Subscriber	Shares Held	Amount Thereof
.....	.....	.....
.....	.....	.....
.....	.....	.....

NOTICE OF REMOVAL OF OFFICE AND PRINCIPAL PLACE OF BUSINESS

(To be signed by the secretary and published in newspaper.)

Pursuant to the written consent of the holders of more than two-thirds of the capital stock of....., a corporation duly organized and existing under the laws of the state of California, which consent has been duly filed in the office of said corporation in the county of....., said state, on the.....day of....., and pursuant to a resolution of the board of directors of said corporation, which resolution was duly passed at a..... meeting of said board of directors duly called and held at the said office of said corporation, on the.....day of....., at which meeting more than a quorum of the directors of said corporation was present;

Notice is hereby given that the principal place of business of said corporation will, on the.....day of....., be changed and removed from....., in said state, at....., therein, after which date the principal place of business of said corporation will be at ....., in....., in said state.

REMOVAL OF OFFICE

This notice is published by order of the board of directors of said.....

Dated, ..., at....., Cal., A. D.....

(CORPORATE SEAL) .....
Secretary of.....

CERTIFICATE OF REMOVAL OF OFFICE AND PRINCIPAL PLACE OF BUSINESS OF

....., A CORPORATION

WHEREAS, the holders of more than two-thirds of the capital stock of the..... a corporation, organized and existing under the laws of the state of California, and having its office and principal place of business at....., in the city of....., to-wit: the holders of.....shares of the capital stock of said corporation, have consented in writing to the change and removal of the office and principal place of business of said corporation from its present location at..... in said city of..... to the city of....., in said state of California, which consent in writing is now on file in the office of the company.

AND WHEREAS, pursuant thereto the board of directors of said corporation at a.....meeting thereof, held at the office and principal place of business of said corporation, on the.....day of....., a quorum thereof being present at said meeting, the following resolution was duly put and unanimously adopted, to-wit:

RESOLVED, That the office and principal place of business of this corporation now located at..... in the city of....., state of California, be changed and removed therefrom to....., in said state of California, and that such removal and change take effect on the .....day of....., A. D.....

REMOVAL OF OFFICE

AND FURTHER RESOLVED, That the secretary of this corporation be and he is hereby authorized, empowered, and directed to cause a notice of the intended removal and change of the principal place of business of this corporation to be published at least once a week for three successive weeks in some newspaper published in the county of....., said state, (said county being the county wherein the present principal place of business of this corporation is situated);

AND FURTHER RESOLVED, That the president and secretary of this corporation be and they are hereby authorized, empowered and directed, to do any and all acts and things requisite or necessary to fully and completely effect the change and removal of the office and principal place of business of this corporation, as above provided, and to certify to a copy of the written consent of the stockholders and to a copy of the resolution of the board of directors authorizing the said change of place of said office and principal place of business, and to certify to a copy of the affidavit of the publication of the notice thereof required by the law and to affix to such certificate the corporate seal of this corporation, and to file said certificate and certified copies thereof in the places wherein the same are by law required to be filed.

THEREUPON,

We, the undersigned, ..., the president, and....., the secretary, respectively, of....., a corporation duly organized and existing under the laws of the state of California, do hereby certify and declare:

That the foregoing copy of the resolution removing and changing the principal place of business of said corporation from....., in said state, at rooms..... therein, to....., in said state, at No. .....street therein, is a full, true and correct copy of a resolution duly passed and adopted at a .....meeting of the board of directors of said company, held at its said place of business in the city of ....., on.....the.....day of....., of which said meeting all directors

REMOVAL OF OFFICE

of said corporation had due and legal notice and a majority and quorum of said board were present at said meeting and unanimously voted in favor of the adoption of said resolution; and,

That the copy annexed of the affidavit, showing publication of the notice of the removal and change of the principal place of business of said corporation is a full, true, and correct copy of the affidavit showing such publication as therein set forth and that the original thereof is on file in the office of said company, and that the notice so published was duly executed by the secretary of said corporation and the publication thereof duly made by said secretary in the manner set forth in said affidavit.

That the foregoing copy of the written consent of the holders of more than two-thirds of the capital stock of said corporation to the removal and change of the location of the office and principal place of business of said corporation is a full, true, and correct copy of said written consent, and that the subscribers thereto are the holders of more than two-thirds of the capital stock of said corporation, and that the original of said written consent is on file in the office of said corporation.

IN WITNESS WHEREOF, we, the president and secretary, respectively, of said corporation, have hereunto signed our names as such, and affixed the corporate seal of said company this.....day of....., A. D.....

.....President,

(CORPORATE SEAL) .....Secretary,

of .....

a corporation.

STATE OF CALIFORNIA, }
COUNTY OF..... } ss.

On this, the.....day of....., A. D....., before me, ..., a notary public in and for said county of....., state of California, residing therein, duly commissioned and sworn, personally appeared....., known to me to be the president, and....., known to me to be the secretary, of the..... ....., the corporation described in the within

instrument, and they severally acknowledged that they executed such instrument as president and secretary, respectively, of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the county of....., state of California, the day and year in this certificate last above written.

(SEAL) .....

Notary Public in and for the county of ....., state of California.

CHANGE OF NAME

No assent of stockholders is required. The resolution of the directors may be in the following form:

RESOLUTION AUTHORIZING PETITION FOR CHANGE OF NAME OF THIS CORPORATION

Resolved, By the board of directors of this corporation that it is desirable that its corporate name should be changed from ....., its present name, to.....

Resolved further, That application be made, according to the provisions of the law, to the proper superior court for an order changing the name of this corporation to.....

Resolved further, That the president of this corporation be and he is hereby empowered and directed to employ attorneys for that purpose, and to pay the necessary costs and expenses thereof.

A petition for a change of the corporate name must be filed in the superior court of the county in which its Articles of Incorporation were originally filed, or in which the property of the corporation is situated, signed by a majority of the directors, showing its

present name, the date of its formation, the new name proposed, and the reasons for making such change. It may be in the following form:

(Title of Court) Petition for change of Name

In the matter of the application of....., a corporation, for a change of its name.

The petitioner,....., a corporation, respectfully shows to this honorable court,

I

That said.....is a corporation, duly organized on the.....day of.....19.... and existing under the laws of the state of California, and is engaged in carrying on the business authorized by its Articles of Incorporation to be carried on by it; that its principal place of business is located at..... in.....County, California; that its board of directors consists of.....persons and its present directors are.....

II

That.....is said corporation's present name, and that it is desired and proposed by said corporation that its name be changed to.....

III

That the reason for such change of name, and for the name proposed, is as follows:

(Here set out the reasons fully)

IV

That the proposed name, ..., is not the name of any other corporation now existing in this state, and said proposed name does not so closely resemble the name of any such existing corporation as will tend to deceive.

CHANGE OF NAME

V

That at a regular (or special) meeting of the board of directors of said corporation, duly had on the.....day of ....., 19...., by resolution duly adopted, it was resolved that these proceedings be instituted for the purpose of securing such change of name.

VI

WHEREFORE, Your petitioner prays for an order of the court appointing a time for the hearing of this application, and that in such order there be designated a newspaper in which publication of notice of this application may be had for a period of four successive weeks prior to said day of hearing, and for an order of the court changing the name of said corporation to.....

.....
(The corporate name)
By.....
President and Director.
.....
Director.
.....
Director.
.....
Director.

being a majority of the directors of said corporation.

(Oath of President to foregoing petition)

The court then makes an order fixing the time of hearing and ordering publication of notice thereof.

Order to Show Cause Why Petition for Change of Name Should Not Be Granted

In the matter of the petition of....., a corporation, for a change of its name,.....; the said corporation, and....., ...,

CHANGE OF NAME

....., a majority of the directors thereof, having filed and presented an application and their petition that the name of said....., be changed to.....

It is hereby ordered, that all persons interested in said matter appear before the superior court of the State of California in and for the (city and) county of....., department....., at the county court house in said (city and) county on the.....day of....., 19.... at the hour of.....o'clock (A. M. or P. M.), or as soon thereafter as counsel can be heard, to show cause why such petition for change of name should not be granted.

And it is further ordered that notice of said application, and of this order, be given by publication in the....., a newspaper of general circulation, printed and published in said (city and) county of....., State of California, once a week for four (4) successive weeks, before said hearing.

Dated.....19....

.....

Judge of said Superior Court.

Upon the hearing of the application, with the other evidence, there must be presented and filed a certificate of the secretary of state, that the new name is not the same, nor so closely resembling the name of another, as will tend to deceive.

Decree Changing Name

(Title of Court)

In the matter of the petition of the....., a corporation, for a change of its name.

This matter coming on regularly for hearing, in open court, this day, the petitioners herein appearing by their attorneys ....., and no objections by any

CHANGE OF NAME

person being filed (or if objections are filed state names of objectors and their attorneys), and both oral and documentary evidence being introduced and it appearing therefrom to the court that the petition in this matter was regularly filed according to law, and that the publication of the order made upon the filing of the said petition and of the time and place of the hearing thereof, was duly made according to law, and that at the hearing thereof the said petitioners filed in court the certificate of the secretary of state that the name desired is not the corporate name of any corporation existing at said time and that said name does not so closely resemble the name of any existing corporation as will tend to deceive, and that the matters set forth in said petition are true; and, it further appearing to the court that there is good reason for the change of name as prayed for in the petition, and that there are no valid objections to such change of name; now therefore,

IT IS ORDERED, adjudged and decreed that the name of the said....., a corporation, be and the same is hereby changed to.....

Dated.....19....

.....

Judge of the Superior Court.

A certified copy of this decree must be filed within thirty days with the secretary of state (Code of Civil Procedure, section 1279), and in the office of the county clerk of each county in which the original Articles, or certified copies therof, are required by law to be filed (Civil Code, section 300a).

INCREASING CAPITAL STOCK

The provisions of article 12, section 11, of the constitution prohibit an increase of the stock, or bonded indebtedness, without the "consent of the persons holding the larger amount in value of the stock," and this

consent can be given only at a stockholders' meeting called for the purpose of considering this particular matter, of which meeting "sixty days' public notice" must be given.

Section 359 of the Civil Code requires that at this stockholders' meeting the proposition must be carried by a "vote representing at least two-thirds of the subscribed or issued capital stock." This provision is indefinite or uncertain, because the "subscribed capital" and the "issued capital" may not always be of the same amount. Further on, in the first subdivision of this section, occurs the provision "no increase or reduction of capital stock shall be made without the assent of two-thirds of all the subscribed stock." This would seem to eliminate the word "issued" in the earlier part of the section, because, for most purposes, "issued stock" is regarded in law as "subscribed stock"; subscribed stock may, and often does, exceed the issued stock.

The meeting of stockholders must be called by the board of directors.

The notice of this meeting must state the object of the same, and the amount to which it is proposed to increase the capital stock, the time and place of holding the meeting, which place must be at the principal place of business of the corporation and at the building where the board of directors usually meet.

The notice of this meeting of stockholders must be given by publication in a newspaper published in the county, or city and county, where the principal place of business of the corporation is located, once a week for at least sixty days before the meeting, and if the by-laws designate a newspaper in which all notices of

meetings shall be published, the notice must be published in such paper.

The publication of this notice can not be dispensed with, even if all the stockholders should be present at the meeting and vote for the increase of the stock; which is another illustration of the absurdities of our law on this subject, and of the numberless irrational provisions in the general body of our corporation law. See Navajo M. Co. v. Curry, 147 Cal. 581; s. c. 109 Am. St. 176, and note.

In addition to the notice by publication, the secretary of the corporation shall send this notice by mail, at least thirty days before the day appointed for such meeting, postage prepaid, addressed "to each of the stockholders whose names appear on the company's books as sufficiently addressed or identified, at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate." For awkwardness of expression, and uncertainty of meaning, this provision is not excelled—doubtless has no rival. If the "known" address is different from the "sufficiently addressed" appearance on the books, safety would demand that two notices be sent to such stockholder, one to each of said addresses; again what amounts to knowledge of the address, and whose knowledge of the same controls? Again, is a certificate sufficient which does not specifically state (not in the disjunctive language of this clause) that knowledge?

If the proposition for the increase of capital is duly carried at such stockholders' meeting, the president and secretary, and a majority of the directors, under the corporate seal of the corporation, must sign a certificate, showing a compliance by the corporation with

INCREASING CAPITAL

the above requirements of the law; the amount to which the capital stock has been increased; the amount of stock represented at the meeting; the total vote in the affirmative and in the negative; the total number of "subscribed or issued shares" (again this uncertain expression) and this certificate must be verified by the oath of both the president and secretary. The meaning of the expression above "showing a compliance," as construed by the secretary of state (there are no decisions on the subject) is that every notice, resolution, publication, proof of publication, and proof of all things done, shall be contained in this certificate, making the same of great length, and full of repetitions.

The original of this certificate must be filed in the office of the county clerk of the county where the original Articles of Incorporation are filed, and a copy thereof certified by such county clerk shall be filed in the office of the secretary of state; thereupon the capital stock is increased to the amount provided in these proceedings.

Great care, and no little skill, are necessary to make all these proceedings conform to the many requirements; a slight failure, or omission, will result in the secretary of state refusing to file the same, which may make it necessary to begin all over again. This law should be made very simple, as it is in most states.

This proceeding is instituted by a

INCREASING CAPITAL

Resolution of Directors Calling Meeting of Stockholders to Consider Increasing the [Capital[1] Stock] of the ....., a Corporation

Resolved, That a meeting of the stockholders of this corporation be and the same is hereby called to be held on the .....day of.....A. D. 19.... at.....o'clock....M. at the office and principal place of business of this corporation at.....in the City of....., State of....., the same being the principal place of business and where the board of directors usually meets, for the purpose of considering and acting upon a proposition to increase the [capital[2] stock of this corporation from $....., divided into .....shares of the par value of $..... each, to $....., divided into..... shares of the par value of $.....each].

Resolved further, That the secretary of this corporation be and he is hereby directed to cause to be published at least once a week for at least sixty days prior to the date of said meeting in the....., a newspaper published in the City of....., which city is where the principal place of business of this corporation is located, a notice to the stockholders of this corporation of the time and place of holding said meeting of stockholders, and specifying the object of the meeting, and stating the amount to which it is proposed to increase the [capital[3] stock] of this corporation.

Resolved further, That in addition to such notice by publication the secretary of this corporation do also address a like notice to each of the stockholders of this corporation whose name appears on the company's books as sufficiently addressed at his place of residence, if known, and if not known, then at the principal place of business of the company which notice shall be mailed, postage prepaid, to each of the stockholders of this corporation at least thirty days before the date appointed for such meeting.

INCREASING CAPITAL

This is followed by the notice of the stockholders' meeting, which must be published, and also be sent by mail to each of the stockholders, in the manner above described.

Notice of Meeting of Stockholders of....., a Corporation, to Consider a Proposition to Increase the [Capital[4] Stock] of said Corporation

Notice is hereby given that, in pursuance of a resolution and order of the board of directors of....., a corporation, unanimously adopted at a meeting of said board duly held at the office and principal place of business of said corporation in the City of....., State of California, on the.....day of....., A. D. 19..., all members of said board being present, a special (or general as the case may be) meeting of the stockholders of said corporation will be held at the office of the corporation in room No.....in.....Building, at No..... of.....Street, in the City of....., State of California, the same being the principal place of business of the said corporation and being the building where the board of directors of said corporation usually meet, on the.....day of....., A. D. 19...., at the hour of.....o'clock....M., for the purpose of considering and acting upon a proposition to increase the [capital[5] stock of said corporation from $.....divided into .....shares of the par value of $..... each, to $....., divided into..... shares of the par value of $.....].

Dated the.....day of.....A. D. 19....

By order of the board of directors.

[CORPORATE SEAL] .....

Secretary of.....

INCREASING CAPITAL

At the meeting of the stockholders a resolution should be passed by the vote of at least two-thirds of the "subscribed or issued" capital stock. (See comments above on this expression.) It may be in the following form:

Resolution of Stockholders Increasing [Capital[6] Stock]

Resolved, By the stockholders of the....., a corporation, representing more than two-thirds of all of the subscribed or issued capital stock of said corporation, in meeting duly assembled and called by the board of directors of said corporation, that said corporation, the..... ....., increase its [capital[7] stock from $.....divided into..... shares of the par value of $.....each, to $.....divided into..... shares of the par value of $.....each, and that the said capital stock of $.....be and the same is hereby increased to $....., divided into.....shares of the par value of $..... each].

Resolved further, That the President and Secretary of said corporation and a majority of the directors thereof shall sign the certificate required by law of the proceedings of the directors and stockholders of said corporation showing a compliance by said corporation with the requirements of law in regard to increase of the [capital[8] stock] of the said corporation and that said Secretary shall file the same in the office of the county clerk of.....County, State of California, and file a certified copy thereof in the office of the Secretary of State of said State.

Immediately following the affirmative action of this meeting the president and secretary, under oath, and a majority of the board of directors, must make the proper certificate, which may be in the following form:

INCREASING CAPITAL

Certificate of Proceedings Authorizing an Increase of the [Capital Stock] of....., a Corporation

We, the undersigned,.....President of the....., a corporation, and .....the Secretary of said corporation, and....., constituting a majority of the directors of said corporation, do hereby certify and declare as follows, viz: That at a special (or regular as the case may be) meeting of the board of directors of said....., held at the office of said corporation at No.....in..... City, in the County of....., State of California, on the.....day of..... A. D....., the following resolution was duly passed and adopted and entered upon the minutes of said corporation, to-wit:

(Here insert the Resolution of the Board of Directors)

And that, in pursuance of said resolution a notice of which the following is a copy, to-wit:

(Here insert the notice)

was published as required in said resolution calling said meeting, viz.; in the....., which is a newspaper published in the City of....., State of California, at least once a week, for each week from the said.....day of.....A. D. 19...., to the.....day of.....A. D. 19...., both inclusive, in all respects as required by said resolution and by law; and in addition to such notice by publication the Secretary of said corporation, in pursuance of said resolution, addressed such notice to each of the stockholders of said corporation (all of whose names then appeared and now appear on the books of the corporation), sufficiently addressed to their respective places of residence, all of such places of residence being then and now known, and mailed said respective notices to said respective stockholders, by depositing in the United States postoffice at said City of.....,

INCREASING CAPITAL

envelopes containing said notices respectively each properly addressed to said respective stockholders and each with the proper postage prepaid thereon, more than thirty days before the said.....day of....., A. D. 19....

That the "....." is and was at all times mentioned herein the newspaper designated in the by-laws of the said corporation as the newspaper in which are to be published all notices of meetings of the directors or of the stockholders of said corporation (if no such newspaper is designated in the by-laws, state that fact).

And we further certify and declare that at the time and place specified in said notice, to-wit, on the.....day of.....19....at.....o'clock in the .....noon of said day, at the principal place of business of said company, in the building where the board of directors of said company usually meets, viz., at the office of said company, No.....Street, in said City of....., all the stockholders of said company appeared in person or by proxy;

That at said meeting the following resolution was duly passed by a vote representing at least two-thirds of the subscribed or issued capital stock:

(Here insert the stockholders' resolution)

That the total number of either the subscribed or issued shares of the capital stock of said corporation at said time was.....;

That the amount of stock represented at said meeting of said corporation was $.....;

That the total vote on said resolution in the affirmative was .....shares;

That the total vote in the negative on said resolution was .....;

That the amount to which the [capital[10] stock] of said corporation has thereby been increased is $.....

IN WITNESS WHEREOF, we have hereunto set our hands and caused the corporate seal of said corporation to be hereunto

INCREASING CAPITAL

affixed at the city of....., county of....., state of....., this.....day of....., A. D. 19....

.....
President.

.....
Secretary.

.....

[CORPORATE SEAL] .....

.....

.....

Directors of the.....corporation and constituting a majority of the board of directors of said corporation.

STATE OF CALIFORNIA, }
COUNTY OF ..... } ss.

.....and.....each being duly sworn deposes and says that the said..... .....is the President and the said .....is the Secretary of the ....., a corporation, mentioned in the foregoing certificate; that they each have read the foregoing certificate and know the contents thereof, and that the same is true to the knowledge of each of them.

.....

.....

Subscribed and sworn to by said..... and the said.....before me this .....day of.....A. D. 19....

.....

[NOTARIAL SEAL] *Notary Public in and for the County of....., State of California.*

(Add acknowledgment for the Directors)

INCREASING BONDED INDEBTEDNESS

Proceedings to *increase* the bonded indebtedness of a corporation are required to be taken under the identical statutory provisions as those controlling an increase of the capital stock; neither of these results can be accomplished without a stockholders' meeting, notices to each stockholder, publication, etc., as above set out—the written consent of the stockholders can not be used as the basis of either proceeding.

These proceedings may be taken, notwithstanding the proposed increase would exceed the subscribed stock (not to exceed the authorized capital stock) but the bonds can be sold only as the stock is subscribed. See Merced etc. Co. v. Curry, 157 Cal. 727.

The form of proceedings may be taken by substituting for the words contained in the several brackets [ ], (which are numbered for further identification) the words suggested below, that is for words in

[1] the following "bonded indebtedness"

[2] "bonded indebtedness of this corporation by creating an additional bonded indebtedness of the sum of $....., that said bonds shall be negotiable in form, of such denominations as the board of directors may determine, and bear interest at the rate of.....per cent per annum, payable.....annually, and be secured by a deed of trust of, or mortgage upon all, or any part of the property, rights and franchises of this corporation, which it may now own or hereafter acquire, which bonds and deed of trust or mortgage shall contain such other and further provisions concerning the maturity and payment thereof, the payment of attorney's fees, and such other terms and conditions and covenants as the

ORIGINAL BONDS—DIMINISHING CAPITAL

board of directors of the company shall deem proper"

[3] "bonded indebtedness"

[4] "bonded indebtedness"

[5] same as No. 2 above

[6] "bonded indebtedness"

[7] same as No. 2 above

[8] "bonded indebtedness"

[9] "bonded indebtedness"

[10] "bonded indebtedness"

CREATING ORIGINAL BONDED DEBT AND DIMINISHING CAPITAL STOCK

The original creation of a bonded indebtedness of a corporation, and a diminution of its capital stock, may be accomplished by proceeding under the same statutory provisions, and in the manner set out above for "increasing the bonded indebtedness."

An alternative, and much simpler method, is provided for accomplishing these results, based upon the written assent of the holders of two-thirds of the "subscribed or issued capital stock."

CREATING AN "ORIGINAL BONDED INDEBTEDNESS" AND DIMINISHING THE CAPITAL STOCK

ALTERNATIVE METHOD—SHORT FORM

This manner of proceeding must be initiated by the unanimous vote of the board of directors, at a regular meeting, or at a special meeting called for that purpose. The "unanimous vote" required is of the directors

present at the meeting, if a quorum be present; not the unanimous vote of all of the directors including those, if any, not present at the meeting. Tidewater S. Ry. Co. v. Jordan, 163 Cal. 105.

The notice of this meeting of the directors must state that one of the purposes thereof is to "originally create a bonded indebtedness," or to "diminish the capital stock," as the case may be, and should be ample, and duly served in the time and manner provided in the by-laws. It may be in the following form:

Notice of Meeting of Directors of....., a Corporation, to Consider the Creation of an Original Bonded Indebtedness

Office of the.....
No....., ... Street, ...,
(date) 19....

To Mr.....

Please take notice that a general (or a special, as the case may be) meeting of the....., a corporation, will be held at the office and principal place of business of said corporation, at.....Street, in the City of....., California, on the .....day of.....A. D. 19...., at.....o'clock.....M. for the purpose of considering a proposition of originally creating a bonded indebtedness of said corporation, and to do such things and take such proceedings as properly and usually pertain thereto.

By order of the President.

.....
Secretary.

CREATING ORIGINAL BONDED DEBT

At this meeting of the board of directors, the board will pass a resolution authorizing the creation of said original bonded indebtedness. It may be as follows:

(Resolution of Board of Directors)

Resolved, By this board, a quorum thereof being present, and each member of the board present voting in the affirmative and no vote being in the negative, that this corporation originally create a bonded indebtedness to the amount of .....dollars, to be secured by a deed of trust of, or mortgage upon, all or any part of the property, rights and franchises, of this corporation, which it may now own or hereafter acquire, which bonds, and deed of trust or mortgage, shall contain such provisions concerning the maturity and payment thereof and such other terms, conditions and covenants proper to be contained in such instruments, as the board of directors shall deem proper. [No details concerning any of the above matters are required by the statute to be set out in the notice, the initial resolution of the directors, the assent of stockholders, or the certificate of the creation of the bonded indebtedness.]

Resolved further, That the board of directors of the company be, and it is hereby authorized, empowered and directed to take any and all proceedings and to do all things which it shall deem proper or necessary in carrying into effect the purposes above mentioned.

A copy of the foregoing resolution must be sent by the secretary of the corporation, postage fully prepaid, "to each of the stockholders whose names appear upon the company's books as sufficiently addressed or identified, at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate," which notice must be mailed to such stockholders at least thirty

days before the certificate is made of the fact that such original bonded indebtedness has been created.

It seems that nothing dispenses with the sending of this notice; not even the fact that two-thirds or all of the stockholders may file their written assents to such creation of indebtedness.

During this thirty days, any stockholder may file with the secretary of the corporation his dissent to the proposal.

If, however, at any time during this thirty days, all of the stockholders have filed with the secretary of the corporation their written assents to the creation of such original bonded indebtedness, the certificate of its creation may be made, signed and filed at once, without waiting for the expiration of the full period of thirty days.

The assent of the "stockholders holding two-thirds of the subscribed or issued capital stock of the corporation to such original creation of bonded indebtedness," may be in the following form:

Assent of Stockholders to the Original Creation of a Bonded Indebtedness

We, the undersigned, holders of the shares of the subscribed or issued capital stock of....., a corporation, set opposite our respective names hereunder subscribed, hereby assent in writing to and approve the original creation of a bonded indebtedness of said corporation, to the amount of.....dollars, as more particularly described in a resolution of the board of directors

CREATING ORIGINAL BONDED DEBT

of this company adopted on the.....day of..... A. D. 19.... which said resolution is as follows:

(Here insert a copy of the resolution)

SUBSCRIBERS	SHARES
.....	.....
.....	.....
.....	.....

It is the better practice to have the subscribers acknowledge the execution of this assent, before a notary public.

The written assents of the stockholders must be filed with the corporation.

The certificate of the creation of such original indebtedness may be in the following form:

Certificate of Original Creation of Bonded Indebtedness

We, the undersigned,....., the President, and....., the Secretary, and....., ..., a majority of the directors, of....., a corporation, do hereby certify as follows, to-wit:

That at a regular (or special, as the case may be) meeting of the board of directors of the aforesaid corporation, duly called and noticed, held at the office of said corporation at No.....Street, in the City of ....., State of California, on the .....day of.....A. D. 19...., the following resolution was duly adopted by the unanimous vote of said board, and entered upon the minutes of said board and records of said corporation, to-wit:

(Here copy resolution)

CREATING ORIGINAL BONDED DEBT

That on the.....day of.....A. D. 19...., a copy of the foregoing resolution of the board of directors was, by the secretary of said corporation, duly addressed and mailed, postage fully prepaid, to each of the stockholders of said corporation whose names appeared upon the books of said corporation as sufficiently addressed, or identified, at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate;

That the total number of subscribed or issued shares of the capital stock of said corporation is.....shares, and

That thereafter, on or before the.....day of..... A. D. 19.... the holders of more than two-thirds, to-wit of .....per cent (or all, as the case may be) of the subscribed or issued capital stock of said corporation, filed with the secretary of said corporation their written assents and approval of the aforesaid resolution of the board of directors of said corporation, fully ratifying and confirming the same, and that the holders of.....shares of said stock (or no one as the case may be) filed their written dissents to said resolution of the board of directors, and that all of said written assents (and dissents if there were any) are now on file in the office of the secretary and in the records of said corporation, and that the amount of bonded indebtedness, so originally created, is the sum of.....dollars.

IN WITNESS WHEREOF, we have hereunto set our hands and caused the corporate seal of said corporation to be hereunto affixed, this.....day of.....A. D. 19....

.....
President.

.....
Secretary.

.....

.....
Directors of.....,
a Corporation.

Said above named directors being a majority of the board of directors of said corporation.

It is the better practice to have the above named signers acknowledge their execution of this certificate before a notary public.

The president and secretary must add their verification to this certificate, as in the preceding form for increase of capital stock.

The original of this certificate must be filed in the office of the clerk of the county where the original Articles of Incorporation of the corporation are filed, and a copy thereof certified by such county clerk must be filed in the office of the secretary of state.

Thereupon such original bonded indebtedness becomes duly authorized, and in a sense created.

The indebtedness is not actually created until the bonds are sold. Merced etc. Co. v. Curry, 157 Cal. 727, and the provisions of section 309 of the Civil Code prohibiting the creation of debts beyond the subscribed capital stock have no reference to the foregoing proceedings, for no debt is created thereby. All that is necessary is that sufficient stock be subscribed to equal all the bonds sold and delivered, as and when they are delivered. Of course, it would be beyond the power of the corporation to create a bonded indebtedness in excess of its authorized capital stock.

REDUCTION OF CAPITAL STOCK

The reduction of capital stock may be accomplished either by diminishing the number or the par value of the shares. The par value may be reduced to the smallest denomination of current money, that is, to one cent a share.

REDUCTION OF CAPITAL

This short method is begun by the unanimous resolution of the board of directors, which resolution must be approved by the written assents of the holders of at least two-thirds of the subscribed or issued capital stock.

The proceedings, last above, for the original creation of a bonded indebtedness may be followed, step by step, substituting proper clauses describing the manner of the proposed decrease of the capital for those in the above proceeding for creating a bonded indebtedness.

CALLS FOR MEETINGS

The by-laws should dispense with calls and notice of regular meetings of both the directors and stockholders. as may be done under the provisions of Civil Code, section 303, found on page 151 herein. If calls and notices of regular meetings for election of directors are not so dispensed with, they must, in ordinary cases, be given as provided in Civil Code, section 301 (page 147 herein).

A form for the call and notice of the meeting of stockholders required by section 359, for increasing the capital and bonded indebtedness, etc., will be found in the forms for those purposes at pages 747-756, herein.

Calls and meetings for some purposes can not be dispensed with, as will be seen by examination of the sections of the statutes, and this work, concerning the particular matters. In such cases the object of the meeting must be stated in both the call and the notice; and generally, when the by-laws make no provisions governing calls and notices they are regulated by the

CALLS FOR MEETINGS

provisions of section 320 of the Civil Code, found on page 230 herein.

When the statutes do not specially require it, it is not necessary to state the object of any meeting, either in the call or notice.

Even in calls and notices, where the object of the meeting is stated, both should contain the additional statement that the meeting may also "transact any other business properly coming before the meeting."

The resolution of the board of directors (where necessary) calling a meeting of the stockholders may be in the following form:

RESOLUTION OF DIRECTORS CALLING A MEETING OF STOCKHOLDERS

On motion duly made, by the affirmative vote of a quorum of the board of directors, the following resolution was duly adopted:

Resolved, That [a special meeting] [the annual meeting] of the stockholders of this corporation, the ....., is hereby called to meet at the office and principal place of business of this corporation located at Room No. .. at No. ...., ...Street, in the City of....., State of California, on.....the.....day of ....., 19...., at.....o'clock in the.....noon of said day, for the purpose of..... and the transaction of any other business which may properly come before said meeting, and be it further

Resolved, That notice of said meeting be signed by the president and secretary [or other person provided in the by-laws, if the president and secretary should be absent or refuse to act] and be mailed to each stockholder, at his last known address, or, if such address is unknown, as otherwise provided by the statutes, and that a copy of said notice be published for two weeks immediately prior to said meeting by advertisement in the newspaper appointed by the by-laws for such purposes

NOTICE OF STOCKHOLDERS' MEETING

[or if the by-laws have appointed no such newspaper, then in the manner provided in section 301 of the Civil Code], which notice shall be as follows: [Here copy notice which immediately follows this resolution.] .

NOTICE OF STOCKHOLDERS' MEETING

Notice is hereby given that [the annual] [a special] meeting of the stockholders of the....., a corporation, will be held at the office and principal place of business of said corporation, located at Room .... at No. ...., ...Street, in the City of....., in the State of California, on.....the..... day of....., 19...., at.....o'clock in the.....noon of said day, for the purpose of..... ....., and the transaction of such other business as may properly come before said meeting.

By order of the Board of Directors of said Corporation.

Dated this.....day of....., 19....

[CORPORATE SEAL] .....

President of said Corporation.

.....

Secretary of said Corporation.

The by-laws should make provision that a stockholders' meeting may be called by a certain percentage of the stockholders as well as by the board of directors.

AFFIDAVIT OF MAILING NOTICE

STATE OF CALIFORNIA, }
COUNTY OF..... } ss.

.....being duly sworn says that he is, and at all the times herein mentioned was, the..... of....., a corporation, organized and existing under the laws of the State of California, and having its office and principal place of business in .....; that on the..... day of....., 19...., he addressed a written

WAIVER NOTICE STOCKHOLDERS' MEETING

[or printed] notice of [the annual, or special] meeting of the stockholders of said corporation, contained in a separate envelope, to each of the stockholders whose name appears on the company's books as a stockholder in said corporation on said date, at his last known residence [a different manner and form are required in proceedings to increase stock and bonded debt and for other things provided in Civil Code, section 359; see pages 747-756 herein], and on the same day deposited the same, postage fully prepaid, in the United States mails at said city where said corporation has its office and principal place of business, a true copy of which notice is hereto attached and made a part hereof.

.....

Subscribed and sworn to, etc.

WAIVER OF NOTICE OF STOCKHOLDERS' MEETING

(See Civil Code, sections 302, 317, and 312, pages 175, 182, and 195 herein.)

We, the undersigned, being stockholders of.....
....., a corporation, and all of the stockholders of said corporation, who have stock in their own names on the stock books of said corporation ten days prior to the meeting of the stockholders of said corporation, at the office and principal place of business of said corporation on the .....day of....., 19...., hereby waive notice of said meeting and sign this our written consent on the records of said meeting to the holding thereof, and we each hereby consent and agree that the proceedings of said meeting shall be as valid as if had and done at a meeting regularly called and noticed.

.....
.....
.....
.....

This document should be incorporated into and become part of the minutes of the proceedings of the meeting.

WAIVER NOTICE DIRECTORS' MEETING

The statutes of most Eastern states concerning waiver of notices are clear, simple and effective. Our statutes on this subject, Civil Code, sections 317 and 320a, are so awkward in structure as to be almost unworkable and are among the smaller examples of blindness of conception found in our curious corporation law.

WAIVER OF NOTICE OF DIRECTORS' MEETINGS

[Civil Code, section 320a, page 234 herein, which is substantially a copy of section 317, concerning the waiver of notice of stockholders' meetings.]

The foregoing form, omitting the statement in regard to the stock standing in the name of the signers on the books of the company ten days before the meeting, will serve as a model for the director's waiver of notice.

This waiver should be incorporated into and become a part of the minutes of the proceedings of the meeting.

PROXY

KNOW ALL MEN BY THESE PRESENTS:

That I,....., the undersigned, a stockholder in the....., a corporation, do hereby constitute and appoint A. B. [or A. B. and C. D., or either of them] my true and lawful attorney [with full power to my said attorney of substitution and revocation (if this right is desired to be given)] in my name, place, and stead, to represent me, and to vote at all stockholders' meetings of said corporation until the.....day of ....., 19...., all shares of stock standing in my name on the books of the corporation, to the same extent as I could if I were personally present at such meetings, hereby revoking all former proxies heretofore made or given by me.

[If desired add: I further empower my said attorney to sign my name to all acknowledgments of notices, to all consents for meetings, consents to waivers of every kind, and to consent to

PROXY AND REVOCATION

all proceedings of every nature which said corporation may lawfully do or undertake], hereby ratifying and confirming all that my said proxy and attorney in fact [and that the duly appointed substitute for my said attorney] may do by virtue hereof.

.....

If it is desired to give the proxy and attorney power to sign consents to proceedings (which would include bond issues, etc.) the execution of the power ought really to be acknowledged before a notary public as protection to the stockholder, the attorney, and the corporation.

BY A CORPORATION

A proxy by a corporation, to vote stock owned by it in another corporation, should be appointed by a resolution of the board of directors; there is no authority in this state for the president or other officer of the holding company to vote such stock. It is a good plan for the by-laws of the corporation to authorize the "president and secretary, or either of them," to vote such stock; such a provision makes the matter quite simple. This authority should contain the words, "or either of them," otherwise both would have to be present at the meeting to cast the vote; it is not prudent to confine the power to one officer, as he may not be able to be present.

REVOCATION OF PROXY

KNOW ALL MEN BY THESE PRESENTS:

That the proxy and power of attorney heretofore executed by me, whereby I constituted and appointed.....
.....my proxy and attorney for the purposes therein set forth in matters in connection with votes, elections, consents, waivers, and proceedings of.....
....., a corporation, are hereby revoked and made null and void.

DESIGNATION OF AGENT FOR A FOREIGN CORPORATION, UPON WHOM PROCESS MAY BE SERVED IN CALIFORNIA

KNOW ALL MEN BY THESE PRESENTS:

That, in compliance with the laws of the State of California, the....., a corporation organized and existing under the laws of the State of....., and carrying on business in the State of California, pursuant to a resolution duly adopted by its board of directors, has designated, appointed, and constituted, and by these presents does hereby designate, appoint, and constitute..... ....., residing in the City of....., State of California, as the person upon whom process against said corporation issued by authority of or under any law of the State of California may be served, to be valid and bind said corporation.

IN WITNESS WHEREOF, the said corporation has caused these presents to be signed by its president, and attested by its secretary, in its behalf, and affixed hereto its corporate seal, this.....day of....., A. D. 19....

[SEAL] .....Company.

By....., *its President.*

ATTEST:

.....,
Secretary.

ASSESSMENTS

ORDER (RESOLUTION) LEVYING AN ASSESSMENT

Resolved, That the sum of.....dollars be and is hereby called from the stockholders of this corporation for [here briefly state the purposes] and an assessment of..... on each share of the subscribed capital stock of this corporation is hereby levied, payable on or before the.....day of ....., A. D. 19...., to the treasurer of the corporation, at the office of the corporation at..... ....., and that the.....day of ....., A. D. 19.... [which must be subsequent to the full term of publication of the assessment notice, not less than thirty days nor more than sixty days from the

IN ASSESSMENTS

time of making this order levying the assessment, see Civil Code, section 334], be and is hereby fixed as the day on which said assessment shall become delinquent, and the.....day of ....., A. D. 19.... [which must be not less than fifteen nor more than sixty days from the day the stock is declared delinquent], be and is hereby fixed as the day for the sale of the stock delinquent upon this assessment. The secretary is hereby directed and ordered to give all notices required by law, and the by-laws of this corporation pertaining to this assessment, delinquency, sale, and collection of the same.

NOTICE OF ASSESSMENT

See statutory form provided in Civil Code, section 335, at page 480 herein.

DELINQUENT NOTICE

See statutory form provided in Civil Code, section 337, at page 482 herein.

DELINQUENT SALE NOTICE (PUBLICATION)

See statutory form provided in Civil Code, section 337, at page 482 herein, and see Civil Code, section 338, at page 483 herein, for further contents of this notice.

If this sale should be postponed for any reason, the full publication must continue, and at the foot of the same should be a notice of the time to which the sale has been adjourned, which may be as follows:

> The day fixed for the sale of stock for non-payment of the above assessment has been postponed to....., the.....day of....., A. D. 19....
>
> By order of the Board of Directors.
>
> .....,
> *Secretary.*

The statutory provisions concerning the extension of time for the sale are found in the Civil Code, section 345, at page 489 herein. The supreme court has decided

IN ASSESSMENTS

that the total of several extensions shall not exceed thirty days—not that each extension may be as long as thirty days.

RESOLUTION WAIVING SALE

WHEREAS, On the.....day of....., A. D. 19..., there was duly levied an assessment of.....upon each share of the subscribed capital stock of this corporation, payment of which assessment became delinquent on the..... day of....., A. D. 19.... [this waiver of sale, and election to sue the stockholders, can not be made before the day it becomes delinquent, but can be made on that day and at any time (in case of adjournments) subsequent thereto and before the sale, see Civil Code, section 349, at page 495 herein. In regard to the beginning of the publication of the sale notice at least fifteen days before the day appointed for the sale, and the loss of jurisdiction caused by failure to do so, and loss after that time of the power of the directors to make this election, see pages 482, 484, 489, 490], as to the following named stockholders in the amounts set opposite their respective names: (Here set out the names and amounts.)

THEREFORE, Be it resolved that we, the board of directors, elect to waive further proceedings for the collection of the foregoing delinquent assessments, or any part or portion thereof, by the sale of the shares of stock so assessed, and elect to proceed by action to recover the amounts of the said assessments and the costs and expenses already incurred.

VOLUNTARY DISSOLUTION

The method of proceeding for this purpose is set forth in sections 1227 to 1234 of the Code of Civil Procedure, found herein at pages 551 and 552. It is seldom resorted to; the shorter method of permitting the charter to be forfeited for non-payment of the annual license, or the franchise tax, being usually adopted.

IN RE DISSOLUTION

The requirement that the matter go through the superior court serves no useful purpose, for the court can not settle up the affairs of the corporation. The petition can not be filed while a single unpaid debt, even if contingent or disputed, exists. This may require the corporation to continue its existence and business indefinitely unless the attorney general should bring troublesome and expensive proceedings in the courts to forfeit the charter for non-user.

This absurd law was copied in 1872 from the Manufacturing Corporation Act of 1848 of New York, and though often amended since, it is still as glaringly opposed to common sense as it was in the beginning.

This proceeding is begun by a call for a meeting of the stockholders to consider and vote on the matter. The statute makes no provision as to how meetings of stockholders may be called. The manner of making such calls may be provided in the by-laws; if they make such provisions they must be followed in making this call. The purpose of the meeting must be stated in the call and notice. If the by-laws make no provision on this subject the directors may make the call, which may be in the following form:

RESOLUTION CALLING MEETING OF STOCKHOLDERS TO CONSIDER PROPOSITION TO DISSOLVE THE CORPORATION

WHEREAS, It appears to be for the best interests of the stockholders of this corporation to discontinue the corporation's business, and to dissolve the corporation, and that its assets be distributed among the stockholders according to law; and, all claims and demands against the corporation having been satisfied and discharged, therefore it is

Resolved, That a special meeting of the stockholders of this corporation, the....., be and is hereby called, to be held at the office and principal place of business of the corporation at.....

IN RE DISSOLUTION

.....on the.....day of....., A. D. 19..., at the hour of.....o'clock in the.....noon of that day, for the purpose of considering and acting upon a proposition to dissolve the corporation and distributing its assets according to law. The secretary is hereby directed and required to give notice of said meeting in the manner prescribed in the by-laws [if the by-laws prescribe no manner, then notice must be given in the manner prescribed by section 301 of the Civil Code].

PUBLICATION OF NOTICE

NOTICE OF STOCKHOLDERS' MEETING TO CONSIDER PROPOSITION TO DISSOLVE CORPORATION

Pursuant to a resolution of the board of directors of..... ....., a corporation, at a meeting of said board duly held, and duly entered in the minute book of said corporation,

NOTICE is hereby given that a meeting of the stockholders of said corporation is hereby called and will be held at the office and principal place of business of said corporation at..... .....in the City of....., State of California, on the.....day of....., A. D. 19...., at.....o'clock in the.....noon of said day, for the purpose of considering and acting upon a proposition to dissolve the said corporation and distribute its assets according to law.

[CORPORATE SEAL] .....,
Secretary of said Corporation.

At the stockholders' meeting the proposition must be carried by a two-thirds vote of the entire subscribed capital stock of the corporation. It may be in the following form:

RESOLUTION OF STOCKHOLDERS TO APPLY FOR DISSOLUTION OF CORPORATION

WHEREAS, All claims and demands against this corporation, the....., have been satis-

IN RE DISSOLUTION

fied and discharged, and it is deemed to the best interests of the stockholders thereof to discontinue the corporation's business, and to dissolve the corporation, and distribute its assets according to law; now, therefore, be it

Resolved, That this corporation be dissolved and that its assets be distributed according to law, and that a majority of the board of directors make due application to the superior court of the.....of....., State of California, for a decree of dissolution of this corporation.

No resolution of the board of directors pursuant to or confirming the above action of the stockholders is necessary; the power rests solely in the stockholders; nor have the directors any official discretion in the matter of signing the petition to the superior court.

APPLICATION FOR DISSOLUTION OF CORPORATION

may be in the following form:

In the Superior Court of the State of California, in and for the.....of.....

In the matter of the Application for Dissolution of..... ....., a corporation.

The....., a corporation, and a majority of its directors thereunto duly authorized and hereunto signatories, respectfully show:

That said..... is, and at all times herein mentioned has been, a corporation duly organized and existing under the laws of the State of California, and that its office and principal place of business is situated in the.....County of....., State of California;

That said corporation has an authorized capital stock of .....dollars, divided into.....shares of the par value of.....each, and that the total amount of said stock subscribed is.....shares, all of which are issued and are now owned and held by the stockholders thereof;

IN RE DISSOLUTION

That said corporation has a board of directors consisting of .....persons, whose names are..... ......, a majority of whom sign this petition;

That all claims and demands against said corporation have been satisfied and discharged;

That a meeting of the stockholders was duly called to meet for the purpose of considering and acting upon a proposition to dissolve said corporation and distribute its assets according to law; that said stockholders' meeting was duly held at the aforesaid office and principal place of business of said corporation, in accordance with said call, on the.....day of ....., A. D. 19...., and stockholders of said corporation holding more than two-thirds of the subscribed capital stock thereof, to-wit: .....shares, were then and there present; that said meeting duly considered the matter of the proposed dissolution of said corporation, and then and there, by the affirmative vote of.....shares, resolved that said corporation be dissolved and that its assets be distributed according to law, and the directors were thereby authorized, directed, and ordered to make this application for the dissolution of said corporation.

WHEREFORE, said corporation, and the undersigned, a majority of the directors thereof thereunto duly authorized, pray for a decree of this court dissolving said corporation.

.....

A Corporation.

.....

.....

Directors of said.....

[Add verification of each director signing.]

ORDER OF COURT IN MATTER OF DISSOLUTION

[Title of court and matter.]

On presentation of the petition in the above matter, and upon reading and considering the same, it is by the court

ORDERED, that said petition be filed with the clerk of this court, and that....., the.....day of....., A. D. 19...., at the opening of court, or as soon thereafter as

IN RE DISSOLUTION

counsel can be heard, at the court room of Department No..... of this court, be and the same are hereby fixed as the time and place when said petition will be heard, and the clerk is directed to give notice of such hearing, and of the time and place thereof, by publication in the....., a newspaper published in said county, said publication to continue for .....days and up to the aforesaid date set for said hearing.

....., *Judge.*

Dated....., 19....

The notice published by the clerk may be in the following form:

NOTICE OF APPLICATION FOR VOLUNTARY DISSOLUTION OF....., A CORPORATION

[Title of court and matter.]

Notice is hereby given that the....., a corporation, and a majority of the directors thereof, have presented to the superior court of.....County, State of California, a petition praying for the dissolution of said corporation, and that....., the..... day of....., A. D. 19...., at the opening of court or as soon thereafter as counsel can be heard, at the court room of Department No.....of this court, have been appointed as the time and place for the hearing of said application.

Given under my hand and the seal of said court this..... day of....., A. D. 19....

[SEAL] ..... *Clerk.*

By.....
Deputy Clerk.

DECREE OF DISSOLUTION

[Title of court and matter.]

The matter of the application for the voluntary dissolution of....., a corporation,

IN RE DISSOLUTION

coming on regularly this day for hearing and determination, and being duly heard, the court finds:

That on the.....day of....., 19...., in accordance with the order of this court, the said..... ....., a corporation, and a majority of the directors thereof, filed with the clerk of this court the application in this matter for the dissolution of said corporation;

That, in accordance with the order of this court, the clerk of this court has given.....days' notice of said application for the dissolution of said corporation by publication thereof in the....., a newspaper of general circulation, printed and published in said City of ....., in the County of....., State of California, which notice and publication were completed and continued up to and including the day of this hearing, and

That no objection to said application for dissolution of said corporation has been filed herein, and

That all the allegations and statements contained in said application are true, and by the evidence introduced herein were shown to be true.

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed that the said corporation, ..., be, and the same is hereby, dissolved;

And it further appearing to the court, by the evidence introduced herein, that the board of directors of said corporation consists of the following persons, namely: ...., and are proper persons, and entitled to be and they are hereby appointed trustees for the purpose of settling all of the affairs of said corporation, and of distributing and conveying all of the property of said corporation to the stockholders thereof in accordance with said stockholders' respective ownership of said stock.

Dated....., 19....

.....

Judge.

FORM OF BOND, COUPONS, AND TRUST DEED

The forms of these documents are so varied, according to the facts and necessities of each case and sometimes the peculiar desires of the parties, that no more than a sample can be given here. But a sample will often be found useful as a basis from which what is desired may be worked out.

The following is a fair illustration of their form and provisions:

TRUST DEED, INCLUDING BONDS, COUPONS, AND REGISTRATION

THIS INDENTURE, made and entered into this thirtieth day of April, A. D. one thousand nine hundred and ten, by and between Equitable Light and Power Company, a corporation duly organized and existing under the laws of the State of California, and having its office and principal place of business in the City and County of San Francisco, State of California, hereinafter styled the "company," the party of the first part, and Union Trust Company of San Francisco, a corporation likewise organized and existing under the laws of the State of California, for the purpose, among others, of holding and administering property in trust, and having its office and principal place of business in the City and County of San Francisco, State of California, hereinafter styled the "trustee," the party of the second part,

WITNESSETH:

Stockholders' meeting authorizing the Bond issue

1. THAT WHEREAS, by resolutions duly passed, by a vote of the stockholders representing, owning and holding more than two-thirds of the subscribed capital stock of the company, at a meeting of the stockholders of the Equitable Light and Power Company, duly called and held for said purpose on the 25th day of April, 1910, and the due filing in the office of the county clerk of the City and County of San Francisco of a certificate of creation of bonded indebtedness in the form required by law, and the due filing in the office of the secretary of state of California of a duly certified copy of said certificate,

OF BOND

the board of directors of said Equitable Light and Power Company were and are authorized and directed to cause to be issued bonds of the company to the number of seven hundred and fifty (750), signed by the president and secretary and under its corporate seal, said bonds to be in the sum of one thousand (1000) dollars each, payable twenty-five (25) years from their date, and to bear interest from their date at the rate of six (6) per cent per annum, payable semi-annually, coupons for such interest payments, with the facsimile signature of the secretary of the company lithographed thereon, to be attached to said bonds; and whereas, said board of directors were and are further authorized and directed to cause to be executed by the president and secretary, a prior lien mortgage on all and singular the property of the company, situated in the City and County of San Francisco, State of California, or wheresoever else situated, including all lands, buildings, rights of way, machinery of all descriptions, fixtures, equipment, rights, privileges and franchises of whatever name and nature, or wherever situated, now held, owned or acquired, or hereafter to be held, owned or acquired by the company, to a trustee for the purpose of securing to the holders of said bonds the payment thereof and of the interest thereon;

Denomination of Bonds

Date of maturity

Interest on Bonds

2. AND WHEREAS, the board of directors of said Equitable Light and Power Company, did, at a meeting of said board duly held in obedience to resolution of the stockholders of said company, at which meeting all of the members of said board were present, order and direct by the unanimous vote of all the directors that said bonds should be substantially in the following form, to-wit:

Form of Bonds

UNITED STATES OF AMERICA.
State of California.

Bond $1000. No.....

(Vignette)

EQUITABLE LIGHT AND POWER COMPANY.
Prior Lien Six Per Cent Sinking Fund,
Twenty-five Year Gold Bond.

Equitable Light and Power Company, a corporation organized under the laws of the State of California

OF BOND

(hereinafter called the "company"), for value received, promises to pay to the bearer, or if registered, to the registered owner of this bond, the sum of one thousand (1000) dollars in gold coin of the United States of America of standard weight and fineness, on the thirtieth day of April, in the year nineteen hundred and thirty-five (1935), with interest thereon from the thirtieth day of April, 1910, until the payment or redemption of this bond, at the rate of six (6) per cent per annum, payable semi-annually in like gold coin, on the thirtieth day of October, and the thirtieth day of April, in each year, in accordance with, and upon the presentation and surrender of the interest coupons hereunto annexed as they severally become due. The principal of this bond shall be payable at the office of the Union Trust Company of San Francisco, in San Francisco, California (hereinafter called the "trustee"), or at the office of its successor as trustee of the trusts declared in the mortgage or deed of trust hereinafter mentioned. The interest coupons attached to this bond shall be payable as they respectively become due, either at the office of said Trustee, or at the office of the Corn Exchange Bank in the City of New York, as the holder of this bond, or of said coupons, shall elect.

If default shall be made in the payment of interest on this bond, and if such default shall continue for a period of six (6) months, the principal of this bond may be declared due and payable in accordance with the provisions of the said mortgage or deed of trust.

This bond is one of the series of bonds of the company known as its "Prior Lien Six Per Cent Sinking Fund Twenty-Five Year Gold Bonds," of the denomination of one thousand (1000) dollars each, numbered from one (1) to seven hundred and fifty (750), both numbers included, duly authorized and approved by the board of directors and stockholders of the company, in the manner and form prescribed by law, issued and to be issued in an amount not exceeding in the aggregate the principal sum of seven hundred and fifty thousand (750,000) dollars at any one time outstanding, all of which bonds

OF BOND

are issued and to be issued under and are equally secured without preference, priority or distinction of one bond over another, by a mortgage or deed of trust, dated April thirtieth, nineteen hundred and ten, executed by the company to the trustee, to which mortgage or deed of trust reference is hereby made for a statement of the property mortgaged or pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured. All such rights, as well as other rights of the holder hereof, are subject to the provisions of said mortgage or deed of trust.

A sinking fund has been provided for in the said mortgage or deed of trust to be applied to the redemption of said bonds in the manner and upon the terms therein set forth.

This bond may be redeemed or purchased for the sinking fund, at the option of the company, upon any date on or after the thirtieth day of April, 1915, when interest shall be payable thereon, upon the payment of the sum of one thousand and fifty (1050) dollars, together with interest to the date of redemption or purchase, in accordance with the provisions contained in said mortgage or deed of trust.

This bond may be registered by the owner thereof on the books kept by the trustee, for that purpose at its office, which registration shall be noted by written indorsement made hereon by the trustee, and, after registration, and until transferred to bearer, no transfer of this bond shall be valid unless made upon such books of registry and noted hereon. Such transfer may be to bearer, which shall restore the transferability of this bond by delivery, and successive registrations to a person named, or to bearer, at the option of each owner, may be made.

This bond shall not become obligatory for any purpose until the certificate indorsed hereon shall have been duly signed by the trustee, under said mortgage or deed of trust.

OF COUPON

IN WITNESS WHEREOF, Equitable Light and Power Company has caused these presents to be executed by its president and secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, and the attached interest coupons to be authenticated by the facsimile signature of its secretary lithographed thereon, as of the thirtieth day of April, one thousand nine hundred and ten.

EQUITABLE LIGHT AND POWER COMPANY,

[SEAL] By....., *President.*

By....., *Secretary.*

and;

3. WHEREAS, the said board of directors, at the meeting aforesaid and in the manner and form, and by the vote aforesaid, did further resolve that to each of the said bonds, there should be attached, fifty (50) interest coupons, numbered, respectively and consecutively, from one (1) to fifty (50), both inclusive; that each of said coupons bear the number of the bond to which they are attached, and should have the facsimile signature of the secretary of the company lithographed thereon, each of said fifty (50) interest coupons to represent the interest on the bond to which it is attached at the rate of six (6) per cent per annum for the period of six (6) months, and to be payable at maturity in United States gold coin of standard weight and fineness; that the maturity dates of said coupons should be filled in so as to make them fall due successively at the end of every period of six (6) months after the thirtieth day of April, one thousand nine hundred and ten, to and until the thirtieth day of April, one thousand nine hundred and thirty-five, the first interest coupon to mature on the thirtieth day of October, one thousand nine hundred and ten, and that said coupons shall be in substantially the following form, that is to say:

Form of interest coupons

Coupon No..... $30.00

On the thirtieth day of....., 19...., Equitable Light and Power Company will pay to the bearer at the office of the Union Trust Company of San Francisco, in the City and County of San Francisco,

TRUSTEE'S CERTIFICATE AND REGISTRATION

State of California, or at the Corn Exchange Bank, in the City of New York, as the holder hereof elects, thirty (30) dollars in United States gold coin, of standard weight and fineness, being six months' interest then due on its Prior Lien Six Per Cent Sinking Fund Twenty-five Year Gold Bond No....., subject to the previous redemption of said bond.

....., *Secretary.*

and,

4. WHEREAS, the said board of directors at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further resolve that upon each of the said bonds should be indorsed a certificate to be executed by the trustee, in substantially the following form, that is to say:

Form of Trustee's certificate

It is hereby certified that the within bond is one of the series of seven hundred and fifty bonds described in the mortgage or deed of trust therein mentioned.

UNION TRUST COMPANY OF SAN FRANCISCO.

By....., *Secretary.*

and;

5. WHEREAS, the said board of directors at the meeting aforesaid and in the manner and form and by the vote aforesaid did further resolve that upon each of said bonds should be indorsed, for the registration thereof, a form substantially as follows, to-wit:

The blanks below to be filled only by an officer of the trustee.

Form of registration

DATE OF REGISTRY	IN WHOSE NAME REGISTERED	REGISTRAR'S SIGNATURE

and;

Resolution of Directors authorizing execution of Bonds

6. WHEREAS, the said board of directors at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further authorize and direct that said bonds be

signed by the president and the secretary of the company in its corporate name, and as its corporate act, and under its corporate seal, and be delivered, each and all of them for and on behalf of the company to the said trustee; and

Resolution of Directors authorizing execution of mortgage or deed of trust

7. WHEREAS, the said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, to secure the payment of the said bonds and the interest thereon, did further authorize and direct that the company make, execute, acknowledge and deliver to the said Union Trust Company of San Francisco, as trustee, this mortgage or deed of trust, upon any and all of the real and personal property now owned by the company, and hereafter to be acquired by it during the life or term of this mortgage or deed of trust, and the president and secretary of the company were authorized and directed to execute, acknowledge and deliver this mortgage or deed of trust to the said Union Trust Company of San Francisco, as trustee, in the name of and for and on behalf of and as the act and deed of the company, and to affix the corporate seal of the company hereto, and a copy of this mortgage or deed of trust (except its signatures, affidavits, certificates and acknowledgments) was incorporated in the said resolution as a part thereof and entered in the minutes of the meeting aforesaid and forms part of the said resolution in all its terms and provisions;

Mortgage or conveyance of property in trust

NOW THEREFORE THIS INDENTURE WITNESSETH: That the company in consideration of the premises and of one dollar ($1) to it paid by said trustee, the receipt whereof is hereby acknowledged, and in order to secure the payment of the said bonds and coupons and the faithful observance and performance of all the covenants and agreements in this instrument contained, has granted, bargained, sold, hypothecated, pledged, remised, released, conveyed, aliened, transferred, assigned, mortgaged and confirmed, and by these presents does grant, bargain, sell, hypothecate, pledge, remise, release, convey, alien, transfer, assign, mortgage and confirm, unto the said trustee, its successor and successors in the trust hereby created, its and their assigns forever, all of the company's properties, whether real or personal, situate, lying and being in the City and County of San Francisco, State of California,

OF TRUST DEED

or wheresoever else situated, particularly described as follows, to-wit:

Water, steam and electric plants

All and singular the company's plants, electric works, power houses, or other stations or buildings for the production, generation, transmission or storage of cold and hot water, steam and electricity and the fixtures, fittings, and equipment thereof including all pumps, dynamos, engines, boilers, transformers, meters, converters, switchboards, shafting, belting, and other appliances, and all transmission lines, conduits, feeders, poles, mast arms, brackets, pipes, cables, wires, insulators, lamps, and electric fixtures of every kind and nature whatsoever; all buildings, apparatus, and appliances for the pumping of water and the manufacture, transmission or distribution of water, steam and electricity; all franchises, privileges, easements, rights of way, authorizing the erection, maintenance or operation, upon, over or under the streets, alleys, highways, or public places, within the said City and County of San Francisco, or upon, over or under any private property within said city and county, of poles, wires, conduits, mains, pipes, or other structures or apparatus for the transmission or distribution of water, steam or electricity for any purpose whatever.

Real estate and all other property

TOGETHER with all other real and personal property of every kind, character, name and nature and description now belonging to the company, or which may at any time hereafter be acquired by it, wherever situate, and whether the same is specifically enumerated herein or not, including shares of stock in and bonds of corporations, which the company now has, or may hereafter acquire, during the life or term of this mortgage or deed of trust.

Also after-acquired property

AND TOGETHER with all and singular the appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Leases, franchises and other rights

ALSO all leases, rights, patents, patent rights, inventions, licenses, franchises, rights of way, easements, contracts and agreements which the company now has, or which shall be hereafter acquired, held or owned by the company, or to which it shall be a party, or in or under which it shall have any

right, title or interest, during the life or term of this mortgage or deed of trust.

TO HAVE AND TO HOLD the above described properties, rights, privileges, immunities and franchises unto said trustee, its successor or successors in said trust, and their and each of their assigns, to its and their own proper use, benefit and behoof forever, BUT IN TRUST, NEVERTHELESS, under the terms of this mortgage or deed of trust, for the uses and purposes herein set forth.

Trustee attorney in fact for the Company

For the further carrying into effect of this mortgage or deed of trust, the company hereby appoints the said trustee, and its successors in said trust, the attorney of the company, in its name and behalf to ask, demand and receive payment and delivery of any and all sums of money, notes, chattels and effects assigned and transferred to the said trustee, by this mortgage or deed of trust, or intended so to be, and to give effectual releases and discharges in the name of the company to the party or parties making such payment or delivery; and for any or all of the purposes aforesaid, or of this instrument, the said trustee may appoint an attorney or attorneys, agent or agents, and may from time to time revoke such appointments, and may use the name of the company, and generally act in relation to the premises as it, or they, shall deem best, but such powers may only be exercised in case of the occurrence of some one of the defaults mentioned in article IV of this mortgage or deed of trust.

ARTICLE I

Property to be held for equal benefit of Bondholders

Said property, rights, privileges and franchises, subject to the terms, conditions and agreements herein contained, shall be held and disposed of by the said trustee for the equal pro rata benefit and security of the person or persons who are or shall be the lawful owners of all or any of the said bonds, without preference of one bond over another, by reason of priority of issue, or of any act or thing whatsoever; *provided however*, that until default shall be made in the payment of the principal or interest of said bonds, or some of them, or in the performance by the company of any of the covenants of

Company to remain in possession until default

OF TRUST DEED

the said bonds or interest coupons, or of this mortgage or deed of trust, the company shall possess, operate, maintain and enjoy all the franchises, rights and property of every kind conveyed by this mortgage or deed of trust and every part thereof, with the appurtenances, and take and use the tolls, income, rents, issues and profits thereof.

ARTICLE II

Estate of Trustee to cease if bonds and interest paid when due

If the company shall well and truly pay the principal of said bonds, and each of them, together with the interest thereon, when the same shall become due and payable, according to the true intent and meaning of these presents, and shall well and truly perform all the other things required by these presents to be done by it, then and thereupon all the estate, right, title and interest of the said trustee hereunder shall cease and determine; otherwise this instrument shall remain in full force and effect.

ARTICLE III

Payment of detached interest coupons deferred in case of default

In case of default hereunder, no interest coupon appertaining to any bond hereby secured, which said coupon shall in any way be assigned, transferred or pledged, separate and apart from the bond to which it relates, shall be entitled to the benefit or security of this mortgage or deed of trust, except subject to the prior payment in full of the principal of all bonds issued hereunder and outstanding and of all interest coupons so far as the same shall have become due according to their terms and which have not been so separately transferred or pledged.

ARTICLE IV

If Company defaults for six months, total amount of Bonds may be declared due

In case default shall be made in the payment of any interest on any bond hereby secured, or in case default shall be made in the payment of the principal of any such bond, or in case default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the company, and any such default shall continue for a period of six months after written notice thereof to the president or vice president or secretary, or in their absence, to any director of the company, from the trus-

tee, or from the holders of a majority in amount of the bonds hereby secured and at the time outstanding, then and thereupon, and at any time during the continuance of such default, the whole amount of the principal of said bonds, together with all accrued and unpaid interest, may, at the option of the said trustee or of the holder or holders of a majority in amount of the bonds then outstanding (notwithstanding any provision to the contrary in said bonds) be declared immediately due and payable; notice of the exercise of such option is hereby waived, and the said trustee shall not be required to signify such election in any manner other than by instituting proceedings to foreclose, whether by entry upon the premises, by beginning a suit or action for foreclosure, or by commencing publication of notice of the sale of the mortgaged property.

In case of default Trustee may take possession of and operate properties

In case of default, or failure as aforesaid, or in case of default in the payment of said bonds or any of them when they fall due and become payable, it shall become lawful for, but not obligatory upon the said trustee to enter upon and take possession of the mortgaged properties (making the entry upon any portion thereof in the name of the whole), and to operate and manage the property and business of the company, collecting all the revenues, issues and profits of the property and business until the net earnings and profits, after the payment of all the reasonable and just charges and expenses of the said trustee, its agents or attorneys, shall have been sufficient to repair and make good the defaults of the Company under these presents.

After default Trustee may sell property

After default as aforesaid and the same continuing as aforesaid, the said trustee, either with or without taking possession of the property as aforesaid, may proceed to sell and dispose of, by one sale or successively through several sales, all and singular the premises and property, rights, interests and franchises hereby conveyed and mortgaged or intended so to be, or such portion thereof as the trustee may deem necessary, at public auction in said City and County of San Francisco, State of California, on such terms as to credits, partial credits and security for payment as the said trustee may think proper, having first given public notice of the time and place of such sale or sales by advertisement printed once a week for at least ten consecutive weeks in some newspaper of general

Public notice of time and place of sale

circulation published in the said City and County of San Francisco, and no other notice to or demand whatsoever upon the company, prior to such sale or sales, shall be necessary. The said trustee is authorized to adjourn such sale or sales from time to time in its discretion, giving what it shall deem reasonable notice of the time and place to which the same may be adjourned. The said trustee is hereby further authorized and empowered, either in its own name or in the name of the company, to make, execute, acknowledge and deliver to the purchaser or purchasers at any such sale good and sufficient deeds of conveyance of the property sold; and any sale made as aforesaid shall be a perpetual bar, both in law and equity, against the company, and all persons claiming by, through or under it, from claiming the property, rights, interests or franchises so sold, or any interest therein. And for the purpose of effecting such conveyance, the said trustee is hereby constituted irrevocably the attorney of the company. As affecting the title to any property purchased at any such sale, the recitals of the said trustee's deed of conveyance, relating to the time and manner of giving notice of such sale and to any other facts affecting the regularity or validity of such sale, shall not be open to contradiction or dispute by any party or parties, but shall conclusively be deemed to be true. The said trustee or any one or more of the bondholders, or any person on its, or their behalf, may purchase the property at any sale of the mortgaged property, whether made under the power of sale hereinbefore contained or pursuant to judicial decree, and the receipt of the said trustee shall be a sufficient discharge to the purchaser or purchasers for his, or their, purchase money.

Trustee may adjourn sale

Trustee to execute deeds to purchasers

Recitals in Trustee's deed conclusive

Trustee or Bondholders may purchase

Receipt of Trustee sufficient discharge to purchaser

ARTICLE V

Foreclosure

The foregoing provision for foreclosure under the power of sale aforesaid is cumulative with the ordinary right of foreclosure by entry, by suit or by action, and the said trustee after default as aforesaid is hereby empowered to have and exercise at its option either, any or all of such rights and all remedies thereto pertaining, against all of the mortgaged property at one time and in one proceeding, or against portions of it successively and in separate proceedings. If the

property be disposed of in parcels, each purchaser shall take good title, notwithstanding that the proceeds of sale already received may have been sufficient to satisfy the debt hereunder. The determination of the said trustee to institute foreclosure proceedings by suit or action, instead of by sale under the power aforesaid, shall not be construed as a waiver of the right of immediate possession on default declared, or of its right to the income, revenues and profits of the company.

Foreclosure suit not a waiver of right of possession

Receiver

At any time after default and the continuance thereof as aforesaid, the said trustee shall be entitled to the appointment of a receiver having such powers and duties and acting under such limitations as the court making the appointment may confer and impose.

Upon taking possession Trustee entitled to keys, books and papers

In case the said trustee shall take possession or make sale of the mortgaged premises in pursuance of the provisions hereinbefore contained, any and all of the keys, books and papers of the company, in any way relating to the mortgaged property or the operation or management of the same, and all personal property in its possession, shall, upon request, be delivered by the company to the trustee or its agents; and it, or they, by itself or themselves, may take possession of such keys, books, and papers and personal property and hold and use the same without any hindrance or impediment whatever by or on the part of the company, or of any person acting or claiming to act, by, through or under it.

By whatever method of procedure this mortgage or deed of trust may be foreclosed, the order or method of distributing any proceeds realized on the sale or sales of the property shall be as hereinafter provided. Outstanding bonds and interest coupons hereby secured may be used in lieu of cash in or toward the payment of the purchase money bid at any sale hereunder, the value of such bonds or coupons for such purpose being calculated and taken at the net sum distributable thereon out of the proceeds of such sale and no more.

Outstanding Bonds and Coupons may be used for payment of purchase money

ARTICLE VI

Manner of disposing of proceeds of sale

Out of the proceeds arising from such sale or sales the said trustee shall first defray the expenses thereof (including the just and lawful charges for its services and expenses, and a

reasonable allowance for attorney and counsel fees), and refund any advances or expenses reasonably incurred by it in operating, maintaining or managing the property or business of the company while in its possession, and all payments made for taxes, assessments, insurance and other proper charges upon said premises and property. The balance of said proceeds shall be applied and paid as follows:

If said balance of such proceeds is sufficient therefor, to the payment of the whole amount of the principal of the bonds hereby secured and then outstanding whether then or thereafter due and payable, with interest at the rate of six (6) per cent per annum thereon up to the time of such payment, together with interest at like rate on overdue installments of interest. If such balance of such proceeds shall be sufficient to pay in full such whole amount of principal and interest as aforesaid, then the principal and interest of said bonds shall be paid without preference or priority of principal over interest, or interest over principal, or of any installment of interest, ratably to the aggregate of such principal and unpaid interest, together with interest on overdue installments of interest; the foregoing provisions are, however, in each case, subject to the provisions hereinbefore made postponing rights of holders of interest coupons as provided in article III. After setting aside from the proceeds arising from any sale hereunder a sum sufficient for the payment of the principal of said bonds and all interest as aforesaid computed to the time when such funds are in the hands of said trustee and available for the making of such payment, the balance of said proceeds, if any, shall be paid over to the company, or its assigns.

ARTICLE VII

Trustee may require indemnity before taking possession or foreclosing

Before proceeding to take possession of the mortgaged property, or to foreclose this mortgage or deed of trust (whether the foreclosure be made by sale under said power or otherwise), the said trustee shall have the right first to require from the bondholders satisfactory indemnity against loss, expense and liability that may be incurred by it in so doing; and upon the tender of such indemnity by the holder or holders of one-

half in amount of the bonds at that time outstanding and unpaid, whether such indemnity shall have been previously requested or not, it shall be the duty of the said trustee, in case of default on the part of the company, occurring and continuing as provided in article IV hereof, to take such action, pursuant to the terms of this mortgage or deed of trust as the bondholders tendering the indemnity may in writing request; *provided, however,* that the said trustee may at its option elect whether to take possession of the mortgaged property, or to foreclose this mortgage or deed of trust by sale under said power or by suit or action, keeping always within the terms of this mortgage or deed of trust.

Duty of Trustee to take action

Article VIII

Delay or omission of Trustee no waiver

No delay or omission by the said trustee in exercising the rights and powers herein granted shall be held to exhaust or impair such rights and powers, or be construed as a waiver thereof. The said trustee agrees upon default other than in the payment of interest on the said bonds, on the written request of the holder of any of said bonds, to give written notice to the company of such default under this mortgage or deed of trust, as the bondholder requesting such notice to be given shall allege to exist.

No Bondholder entitled to act unless Trustee refuses

No holder of any bond or coupon hereby secured shall have the right to institute any suit or proceeding for the sale of the property subject to the lien hereof, or for the foreclosure hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the said trustee written notice of the default of which he complains, nor unless the holders of more than one-half (½) of the bonds hereby secured and then outstanding shall have made written request to the said trustee for such action, or for action hereunder, and shall have given to the said trustee a reasonable opportunity to take such action, and the said trustee shall have neglected to take action thereon, nor unless the said bondholders shall have offered to the said trustee adequate security and indemnity against all loss, costs and liabilities to be incurred in the premises.

OF TRUST DEED

No statutory or constitutional liability of stockholders of Company

No bondholder or trustee hereunder shall, under any circumstances, have recourse to any personal, statutory or constitutional liability against any stockholder of the company arising out of any provision herein, whether such liability now exists or shall hereafter accrue. But each such trustee and bondholder shall look for the payment of the bonds and interest thereon, solely to the assets of the company, it being understood that such assets shall not be considered as embracing any claim which might, under any circumstances, be enforceable either by the creditors of the company, by a receiver in their behalf, or by the company itself, against a stockholder, under any law now or hereafter in force, or against a stockholder by reason of any alleged insufficiency in the payment for shares of stock.

ARTICLE IX

Sale of property by Directors

From time to time and at any time before default is made in the payment of the principal or interest of the bonds secured by this mortgage or trust deed, the company may, by a majority vote of its board of directors, sell, free and clear of this mortgage, or of any lien or incumbrance created hereby, any portion of its personal properties; *provided, however,* that no such sale shall be made or if made shall be valid where the property sold is disposed of for less than the fair value thereof at the time of sale, or where the amount involved on any one transaction exceeds the sum of one thousand (1,000) dollars.

Release by Trustee of Mortgaged property

The said trustee may from time to time release from the lien hereof any of the mortgaged property irrespective of its value, when in its judgment, based upon the certificate of some disinterested person, selected by the said trustee, with reasonable care for the purpose of investigating the question, other property of equal or greater value is substituted therefor and subjected to the lien hereof, so that such release shall not impair the security of the bondholders; or such property may be released from this mortgage or deed of trust upon the deposit by the company with the said trustee of an amount equal to the value of the property to be released, as appraised by such disinterested person and certified by him to the said trustee in writing; and upon receipt of such amount the trustee may execute and deliver a release of the property in

Substitution of other property

Cash deposit

question; *provided, however,* that no property shall be released hereunder, unless at the time of such release it shall no longer be necessary or expedient to retain the same for the operation or maintenance or use of the property then subject to the lien of this indenture, or for use in the business of the company. A resolution of the board of directors of said company shall be sufficient evidence of said fact to warrant such release. No such release shall be made unless the property to be released shall have been sold or the sale thereof, or the exchange of the same for other property, shall have been contracted for.

Application of proceeds

The proceeds of any and all such sales of property for sums in excess of one thousand (1000) dollars, and all money received therefor shall be paid to and held by the trustee hereunder and applied by it to one of the following purposes, namely:

(a) To the purchase of other property, real or personal, for the benefit of the company.

(b) To additions, betterments or improvements to property of the company, which shall then be subject to the lien of this indenture.

(c) To the redemption of outstanding bonds of said issue which may be called for prior payment in accordance with the provisions of article XII of this indenture.

It shall be the duty of the trustee to apply the proceeds of any such sale to the purchase of other property or to such additions, betterments, or improvements, or to such redemption of bonds, only upon the written request of the company, approved by a resolution of its board of directors. Any new property and all additions, betterments and improvements acquired and made in pursuance of the provisions of this article shall forthwith and without further conveyance become and be subject to the lien of this indenture, but if requested by the trustee, the company shall convey the same to the trustee by appropriate conveyance, upon the trusts and for the purposes of this indenture.

The value of any property released hereunder or of any property substituted in lieu of property released, or purchased from the proceeds of sale of any released property, shall be determined by one or more disinterested appraisers appointed

for the purpose by the trustee, and such appraisement, duly reduced to writing, signed and filed with said trustee shall be a complete warrant to the trustee in determining the value of any property released, purchased or substituted.

Property subjected to the lien hereof as a prior lien mortgage before the execution of a release may be treated as substituted for property afterwards released; *provided,* that said trustee shall be notified in writing by the company, at or before actual acquisition of such additional property, that the same is intended as the basis of a future release.

Expenses to be paid by Company

All expense attendant upon any such investigation or appraisement or otherwise upon the securing of such release, shall be paid by the company, and the said trustee shall not suffer or incur any loss or liability in the execution of any such release, or in the application of any money received by it hereunder, if it acts in good faith on the statements set forth in any certificate or appraisement made as above provided.

Company to make additions and repairs

The company further agrees that it will from time to time make such additions to or repairs on the property, buildings, mains or other equipment connected with the mortgaged plant, as may be necessary to keep and maintain the same in first-class repair and in condition for performing good and efficient service.

ARTICLE X

Company will pay taxes and charges

The company hereby expressly covenants and agrees that it will pay any and all lawful taxes, assessments and governmental charges assessed or laid, or which shall be assessed or laid upon the mortgaged properties or any part thereof or interest therein, or upon the said trustee in respect to the same; that it will not suffer any lien superior to the lien hereof to attach to the mortgaged property, or any part thereof; that it will preserve and maintain all franchises and rights now or hereafter possessed by it; that it will conform to all lawful statutes, orders, ordinances and regulations affecting the corporation, its business and property, and that it will keep its buildings and property at all times insured, in insurance companies satisfactory to the trustee, in such sums as shall approximate the reasonable insurable value of the insured property,

Will preserve franchises and rights

Will keep its property insured

payable in case of loss to the said trustee, as its interest may appear, and will deliver to the said trustee the policies of insurance and all moneys received thereunder, to be applied by the company toward the reconstruction or repair of the property destroyed or injured. If at any time the said trustee shall have possession of funds arising from any such insurance policy, and the said company shall so request in writing (provided there be at the time of the application of the money no default hereunder known to the said trustee), said trustee shall upon such request and in the absence of such default, pay said money to the company for said purpose, on receipt of statements signed and sworn to by the president or vice president and secretary of the company, accompanied by receipted vouchers showing that said property has been replaced or superseded by repaired or new plant, building or other property equal in value to the amount of money to be paid over on said statements and vouchers. But if the company shall not within six months from the date of the loss, request in writing to have the insurance money so applied, or in case of any default then existing known to the said trustee, and not made good by the company on thirty days' notice (written), then the money shall be invested by said trustee, in its discretion, in securities which shall form part of the mortgaged or trust property, and shall together with all interest and accumulations thereon, be subject to the provisions of this mortgage or deed of trust in like manner as the other property hereby conveyed, except that the possession of the securities shall be held by the trustee. The said trustee may sell such securities and reinvest the proceeds in its discretion.

Application of insurance money

Insurance money to be invested by Trustee after six months or after default

Provided always that the trustee shall in any event, if requested in writing by the holders of four-fifths in amount of the outstanding bonds, pay over to the company the insurance money, or deliver to it the securities purchased therewith, on receipt of statements and vouchers of the description aforesaid.

ARTICLE XI

Sinking fund

The company further covenants and agrees that between the 30th day of April, 1915, and the 30th day of April, 1916, and similarly during each succeeding year, until the bonds

hereby secured shall have been fully paid, it will pay, in gold coin of the United States, of standard weight and fineness, or its equivalent, to the said trustee as and for a sinking fund for the redemption of outstanding bonds issued hereunder, a sum of money equal to two per cent of the total par value of bonds of said issue outstanding on the 30th day of March, 1915. Also that on or before the 30th day of March, 1935, the company will pay to said trustee such further sums of money as in connection with the moneys then in the sinking fund shall be sufficient to provide for the payment of both principal and interest of all of said bonds issued and at that time outstanding.

If any of said bonds shall be certified by the trustee and delivered at any time after the 30th day of March, 1915, then the company, for the purposes of the said sinking fund, shall at the time of such delivery pay to the trustee such sum of money as will be equivalent to two per cent per annum, calculated upon the par value of the bonds so delivered from the said 30th day of March, 1915, to the 30th day of March next preceding such delivery.

Application of Sinking fund

All money received by the trustee under and pursuant to the provisions of this article, as and for the purposes of such sinking fund, shall be used and applied by the trustee only for the purchase of bonds of the issue herein mentioned. None of such bonds shall be purchased by the trustee under the provisions of this article at a price higher than the sum of one thousand and fifty (1050) dollars for each bond at the time of purchase, together with all interest accrued and unpaid thereon to that date.

Between the 30th day of May and 20th day of June, of the year nineteen hundred and sixteen, and of each subsequent year, until all of said bonds shall have been paid, the trustee shall, if the sinking fund moneys due in such year shall have been received by it, advertise daily for at least fifteen days in some newspaper of general circulation published in said City and County of San Francisco, a notice calling for offers for the sale to it of so many of said bonds as may be required for the investment of all moneys then held by it for the purpose of said sinking fund; said bonds so offered to be delivered to

said trustee by a date to be therein specified, not later, however, than the 10th day of July, in such year. The trustee, if any offer or offers shall be received for the sale to it of bonds of said issue at a price not exceeding that above specified, shall accept the lowest offer or offers so made, and on the next succeeding 20th day of July shall purchase with the moneys then in said sinking fund, so many of said bonds as may have been deposited with it for such purpose and as may be required to absorb or utilize such moneys, or so much thereof as can be used therefor.

Investment of Sinking Fund in bonds tendered

If no such offer shall by the date specified in such notice be received by the trustee, or if the number of bonds so deposited with the trustee shall be insufficient to absorb or utilize all such moneys, then the trustee shall after the said 20th day of July call for prior purchase and on the next succeeding 20th day of August shall purchase at the price of one thousand and fifty (1050) dollars and accrued interest, so many of said bonds as shall be required to absorb or utilize the moneys in said sinking fund (or so much thereof as can be used therefor) in excess of the amount necessary to purchase the bonds, if any, so deposited with the trustee for purchase; *provided, however,* that the serial numbers of the bonds to be so called for prior purchase shall be determined by the trustee by lot under the direction of its president, secretary or trust officer, and shall be called and notice of such call and redemption given in the manner following, to-wit:

Bonds called for prior purchase

All calls of bonds for prior purchase made under and pursuant to the provisions of this article shall be by a notice published by the trustee daily for at least ten days prior to the date fixed and stated in such notice for such purchase (which date shall always be the 20th day of August of the year in which such notice shall be published), in a daily newspaper of general circulation devoted to the publication of general news, and published in said City and County of San Francisco, State of California. Such notice shall give the serial numbers of the bonds so called for prior purchase and the place and date of payment, and shall state that on and after the date fixed for purchase in such notice, no interest upon the bonds so called will be due or payable to the holder thereof. After the date so fixed in such notice, no interest upon the

Method of calling bonds for prior purchase and notice required

bonds so called will be due or payable to the holders thereof, unless payment for the same shall be refused upon their presentation for payment pursuant to such notice.

When any bond shall have been called for prior purchase, the trustee shall not pay to the holder thereof any coupon thereafter maturing appertaining to such bond, unless the bond shall have been presented for purchase and the purchase thereof refused by said trustee.

All bonds purchased by the trustee or called for purchase or payment under the provisions of this indenture, shall, when received by said trustee, be so cancelled as to destroy their negotiability but not their validity, and shall be set aside, kept and treated as a sinking fund investment, and said trustee shall thereafter collect and receive the interest money accruing thereon as the same becomes due and payable. And said trustee shall add such interest money to the sinking fund provided for in this article, and shall invest the same in the purchase of additional bonds for said sinking fund as herein provided; *provided, however,* but only when requested so to do by the terms of a resolution duly adopted by the unanimous vote of the board of directors of the company, the trustee at its discretion may (not must) cancel all or any of the bonds of the company, so as aforesaid acquired as a sinking fund investment, whereupon the same shall become null and void, but said cancelled bonds shall be retained by said trustee until all of said bonds shall have been paid and redeemed; *and further provided,* that all such bonds so held by said trustee as a sinking fund investment shall be cancelled on the thirtieth day of April, 1934.

The trustee shall exhibit any and all bonds purchased in pursuance of this indenture to any officer of the company whenever requested so to do by the president of the company.

Cancellation of bonds redeemed

Upon the payment or redemption of all the bonds of said issue the same shall be cancelled by said trustee and delivered to the company upon demand, and thereupon said trustee shall release the lien of this mortgage.

ARTICLE XII

Recordation of mortgage

The company covenants and agrees to cause this mortgage or deed of trust at all times to be kept recorded as a mortgage

both of real and personal property, in such manner and in such places as may be required by the laws of the State of California, so as to preserve and protect the security of the bondholders and the rights of the said trustee; and agrees to also execute, acknowledge and deliver to the said trustee and properly record and file, a confirmation of this mortgage or deed of trust, or a renewal thereof, or a new mortgage or deed of trust, whenever and so often as may be necessary to fully protect the trustee's title or interest, and the security of the bondholders; each such confirmation, renewal or new mortgage or deed of trust to include all property of the company acquired hereafter and during the life or term of this mortgage or deed of trust, and the conveyance thereof to be made for the same purpose, and on the same trusts as those set forth in this original mortgage or deed of trust. And the company shall and will, from time to time, during the existence of the trust, make, execute, acknowledge and deliver all such further instruments and conveyances as in the opinion of the trustee may be necessary or proper to facilitate the execution of said trust, or to further secure said bonds, all of which additional instruments and conveyances the company agrees to keep properly filed and recorded and renewed as aforesaid.

The further conveyances herein provided for, if made, shall never be construed as a novation or as an alteration of or amendment to this mortgage or deed of trust, but as a part of it pursuant to its terms, and nothing herein contained shall ever be construed as authorizing or permitting the execution of any conveyances which shall or might have the effect of impairing the lien or security of this mortgage or deed of trust as of date hereof.

ARTICLE XIII

Resignation of Trustee

It is hereby further covenanted and agreed that the said trustee or any successor or successors, may, and upon request, in writing, of the holders of three-fourths (¾) of the bonds hereby secured and then outstanding, shall, at any time, resign the trust hereby created by written notice delivered to the president, vice president or secretary, of the company, thirty (30) days before the resignation takes effect, and that, in case

of such resignation, or of the removal or incapacity of the said trustee, by reason of insolvency or other cause, the board of directors of the company shall have the right to nominate and appoint a successor or successors to the said office of trustee, provided there has been no default on the part of the company in payment of the principal or interest due in respect of any of the bonds secured hereby; but any vacancy of more than sixty (60) days' standing may be filled by any court having jurisdiction, on the application of the outgoing trustee or any bondholder or any person interested; any trustee appointed by the board of directors of the company shall be a trust company in good standing. Upon the appointment of any such successor or successors of the trustee, by either method above mentioned all the mortgaged or trust property shall immediately and without conveyance vest in the new trustee for the purposes of the trust hereby created; but the outgoing trustee or trustees shall, nevertheless, at the request of the new trustee or the company, but at the expense of the company, and upon the payment to it of such amounts as may be due to it, hereunder, execute, acknowledge, and deliver to the new trustee such deeds of conveyance or other instruments in writing as may be necessary to vest in or confirm to the new trustee the mortgaged or trust property.

Appointment of new Trustee

Mortgaged or trust property to vest in new Trustee

Article XIV

The term "trustee" as employed in this instrument shall be taken to mean the trustee hereunder for the time being, whether the party of the second part or its successor or successors in the said trust.

Meaning of term "Trustee"

Article XV

The trustee shall keep at its office books for the registration of any of said bonds which shall be presented to it for that purpose. The trustee will, whenever requested so to do by the owner of any of said bonds, register or discharge the same from registry, in accordance with the provisions in said bonds contained. Only such of said bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this mortgage or

Registration

Certificate of Trustee

deed of trust or shall be entitled to any lien or benefit hereunder. No such bond or any coupon thereunto attached shall be obligatory or valid for any purpose until and unless such certificate shall be duly indorsed on such bond. Every such certificate of the trustee upon any bond executed by the company shall be conclusive evidence and the only evidence required that the bond so certified is entitled to the benefit of the trust hereby created.

ARTICLE XVI

Execution of Bonds

All bonds to be issued hereunder and secured hereby, together with the trustee's certificate and the registration memorandum to be indorsed thereon, and their interest coupons, shall be substantially of the tenor and purport above recited. From time to time bonds of said series, as required and as hereinafter provided, shall be executed by the company by its president and secretary for the time being, and shall be delivered to the trustee for certification, and thereupon the trustee shall certify and deliver the same as provided in article XVII of this indenture, and not otherwise. Each and all of said bonds having been executed, issued and certified as aforesaid, shall be valid and binding upon the company whenever the same shall be issued, notwithstanding the officers, by whom the said bonds shall have been signed and sealed on behalf of the company, shall then have ceased to be such officers. In case any bond of said series or any coupon thereof shall

Mutilated or destroyed Bonds

become mutilated or destroyed, the company in its discretion may issue, and thereupon the trustee in its discretion shall certify and deliver, a new bond or coupon of like tenor and date, bearing the same serial number as the mutilated or destroyed one, in exchange for and upon cancellation of the mutilated bond or coupon, or in lieu of and in substitution for the same if destroyed. In case of destruction the applicant for a substituted bond or coupon shall furnish to the company and to the trustee satisfactory evidence of the destruction of such bond or coupon, and shall also furnish indemnity satisfactory to both of them in their discretion. Coupons upon

Coupons authenticated by lithographed signature of present secretary

all of the bonds which shall be issued under the provisions of this deed of trust shall be authenticated by the lithographed

signature of the present secretary of the company, even though he shall have ceased to be such secretary prior to the execution, certification and delivery of the bonds to which said coupons shall be attached. The entire amount of all bonds to be issued under and by virtue of this deed of trust shall not at any time exceed the principal sum of seven hundred and fifty thousand (750,000) dollars par value. The trustee before certifying and delivering any of said bonds, shall cut from such bond and cancel all matured interest coupons annexed thereto.

ARTICLE XVII

Certification and delivery of Bonds by Trustee

Bonds of the issue herein mentioned shall be certified and delivered by the trustee in accordance with the provisions of this article and not otherwise.

The trustee shall, upon the execution and delivery of this indenture, without further action by the company, certify and deliver to the company bonds of said issue of the aggregate par value of five hundred thousand (500,000) dollars represented by bonds numbers one (1) to five hundred (500), both numbers included, and shall thereafter from time to time certify and deliver to the company such other bonds of said issue as may be required;

Provided, however, that the trustee shall not so certify and deliver bonds in excess of said aggregate sum of $500,000, par value, until and after the company shall deposit with the trustee a detailed statement in writing signed by the president or vice president and secretary of the company and verified by the affidavit of one or the other of them, showing that the par value of the additional bonds so certified and delivered is not in excess of eighty (80) per cent of the value of additional properties purchased or improvements made by the company since the last preceding issuance of and delivery of bonds by the trustee.

Receipts executed in the corporate name of the company by its president or vice president and secretary, and under the corporate seal of the company, acknowledging receipt of bonds shall be conclusive evidence of the delivery of said bonds to the company under the provisions hereof.

OF TRUST DEED

ARTICLE XVIII

Trustee has no responsibility as to execution or recordation of mortgage

The company further hereby covenants and agrees to cause this mortgage or deed of trust to be duly and properly filed for record in the office of the county recorder of said City and County of San Francisco, State of California, with all convenient speed, and the said trustee shall have no responsibility as to the execution, acknowledgment or recording of this mortgage or deed of trust as a deed of trust or mortgage or conveyance of real or personal property, or as to any other act which may be suitable or proper to be done for the continuing of the lien of this mortgage or deed of trust, or for giving notice of the existence of the lien thereof.

ARTICLE XIX

Concerning the Trustee

THE TRUSTEE shall not be answerable for, or by reason of, any recital contained herein, or any fact or occurrence mentioned or referred to in any such recital (but any such recital shall be taken as a statement of the company, for the truth and validity whereof the trustee is not responsible), or for the doing or omission of any act or thing necessary to give validity hereto, or to any bond to be issued hereunder, save only the certification and delivery of bonds as herein provided.

THE TRUSTEE shall not be answerable for, or by reason of, the selection or appointment of, or the deposit of moneys with, or the solvency or financial responsibility, or the conduct, in any particular, of any depositary other than the trustee itself, or for the default or misconduct of any agent, appraiser, or attorney appointed by it in pursuance hereof, if such appraiser, agent, or attorney be selected with reasonable care; or for the title to or value of any property constituting the security hereunder, or any part thereof, or with respect whereof bonds shall be certified hereunder; or for the disposition of any bonds or the disposition or application of the proceeds of any thereof, after such proceeds shall have been withdrawn from deposit with the trustee, if they have been so deposited; or for the investment at interest of, or for interest upon, any moneys held or controlled by it hereunder, unless it shall have agreed, expressly, to pay interest upon such money held by it, and then only to the extent so agreed.

OF TRUST DEED

THE TRUSTEE shall not be answerable for the payment of any taxes levied upon the property of the company or upon the interest of the trustee therein, or the bondholders, collectively or severally hereunder, or upon any of the bonds secured hereby, or for the effecting or renewing of insurance upon any of the property subject hereto, or for the solvency or financial responsibility of any insurer; or for the authenticity of any bond, debenture, certificate of stock, or other security, except the bonds certified by the trustee pursuant to this indenture, or for any resolution, certificate, opinion, conveyance, assignment, transfer, affidavit, appointment, order, approval, report, statement, notice, request, waiver, consent, or other paper or document, or any signature received or passed by it hereunder, and believed by it to be, or relied upon by any person or persons reading it as genuine and to have been issued, passed, made, signed or executed, as the case may be, by the proper party or parties.

THE TRUSTEE shall not be answerable for, or by reason of, anything whatever, in connection with this trust, except its own willful misconduct or gross negligence. The trustee assumes no responsibility as to the validity of this deed of trust or mortgage, or of the bonds to be issued thereunder, nor as to the amount and extent of the security afforded by the property covered by this indenture; nor for any breach of any covenants thereof by the company, nor as to the application of any of the bonds certified and delivered to the company, or the proceeds of any of them, for any of the purposes herein expressed, or for the use and disposition of said bonds, or the proceeds thereof,

THE TRUSTEE shall not be personally liable for debts contracted by it, or for damage to persons or property injured, or for salaries, or for non-fulfillment of contracts during any period wherein the trustee shall manage the trust property upon entry or voluntary surrender as herein provided.

THE TRUSTEE shall not be under any obligation to take any action toward the execution or enforcement of the trust hereby created, or for the enforcement of any agreement or lease pledged hereunder, which, in its opinion, will be likely to involve it in expense or liability, unless one or more of the

holders of the bonds hereby secured shall, as often as required by the trustee, furnish reasonable indemnity satisfactory to it against such expenses or liability. Nor shall the trustee be required to take notice of any default (whether herein or under any agreement or lease) unless notified in writing of such default by the holders of bonds hereby secured then outstanding, or to take any action in respect to any default unless requested in writing to take action in respect thereof by the holders of more than fifty (50) per cent of the bonds hereby secured and then outstanding, and tendered indemnity as aforesaid, anything herein contained to the contrary notwithstanding. But neither any such notice or request, nor any provision therefor contained in this indenture shall affect any discretion herein given to the trustee to determine whether or not it shall take any action in respect to such default, or take action without such request.

THE TRUSTEE shall not be answerable for the recording of this indenture as a mortgage, deed of trust, or a chattel mortgage.

THE TRUSTEE shall be protected in any action taken by it upon any resolution, opinion, certificate, conveyance, assignment, transfer, affidavit, appointment, order, approval, report, statement, notice, request, consent, or other paper or document, or any signature believed by it to be genuine, and to have been passed or signed by the proper parties; and the trustee, if in any case it elect to take the opinion of any counsel satisfactory to it, may rely upon and be protected by such opinion as to the sufficiency and regularity hereunder of any such, or any, instrument or paper, or of any opinion, act or proceeding, but it shall not be required to take such opinion in any case, and its failure so to do shall not be deemed to create or establish any presumption of want of care.

Trustee entitled to compensation and reimbursement for outlays

THE TRUSTEE shall be entitled to reasonable compensation for all services rendered by it, and reimbursement of its reasonable expenses, including counsel fees, and the reasonable compensation of its servants and agents incurred in the execution of the trusts hereby created and in the exercise and performance of any of its powers and duties hereunder, and shall have a first lien upon the mortgaged property for all such compen-

sation and reimbursement, and also to indemnify it for, and to hold it harmless against, any liability or expense resulting from the fact that it shall have taken in its, or transferred in its name, the certificate for any stock or title to any bond or debenture subject to this indenture, as well as the cost and expense of defending against any claim or liability in the premises of any nature whatsoever.

THE TRUSTEE shall not be answerable for the custody or safekeeping of any share of stock, bond, or other personal property not transferred and actually delivered to it notwithstanding any recital or declaration herein to the contrary.

Acceptance of Trust by Trustee

The said trustee hereby accepts the trust in the said mortgage or deed of trust declared and provided and agrees to perform the same upon the terms and conditions hereinbefore set forth.

IN WITNESS WHEREOF the parties hereto have hereunto and to a duplicate hereof caused their respective corporate names to be subscribed and their respective corporate seals to be affixed by their respective officers thereunto duly authorized, the day and year first above written.

[SEAL] EQUITABLE LIGHT AND POWER COMPANY,

By.....

President.

By.....

Secretary.

UNION TRUST COMPANY OF SAN FRANCISCO,

By.....

Vice President.

By.....

Secretary.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

On this.....day of May, in the year one thousand nine hundred and ten, before me, ..., a notary public, in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the president, and....., known to me to be the secretary of the Equitable Light and Power Com-

pany, one of the corporations that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

On this.....day of May, in the year one thousand nine hundred and ten, before me, ..., a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared ..... and ....., known to me to be vice president and secretary respectively of the Union Trust Company of San Francisco, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the said corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county and state aforesaid, the day and year in this certificate first above written.

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the president of Equitable Light and Power Company, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is

made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the president of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of .....,19....

[SEAL] .....,

Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, }
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the secretary of Equitable Light and Power Company, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the secretary of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of .....,19....

[SEAL] .....,

Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, }
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the vice president of Union Trust Company of San Francisco, a corporation organized and

existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the vice president of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of ....., 19....

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the secretary of Union Trust Company of San Francisco, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the secretary of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of ....., 19....

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

BY-LAWS

By-laws should be as simple and brief as the necessities of the corporation permit; otherwise unnecessary labor, complications, and confusions may be created.

It is not necessary or advisable to have them state the number of directors which the corporation shall have (that is fixed by the Articles of Incorporation); nor the power of the board of directors; nor that the directors shall be chosen from the stockholders; nor that a majority of the directors shall be residents of this state; nor that a majority thereof shall constitute a quorum; nor that the president must be a director—all of those matters are regulated by law (Civil Code, sections 305 and 308); nor is it necessary to state where the meetings must be held; nor that the holder of each share of stock is entitled to one vote either personally or by his proxy; nor that elections by stockholders shall be by ballot; nor what shall constitute a quorum of the stockholders; nor that stock must stand on the books of the corporation in the name of the person offering to vote the same for ten days prior to the election; nor that if a quorum be not present, stockholders' meetings may be adjourned from day to day, and that the reason for such adjournment must be recorded in the journal of the proceedings of the board of directors(!); nor provisions concerning consent of stockholders to the meeting—all these things are covered, and made unchangeable, by the law contained in Civil Code, sections 290, 307, 312, 314, 317, 319, and, in some special matters, in other sections. Attempting to cover such things in the by-laws is likely to fail in some respect, or to make some provision in them in conflict with the statutes, or subsequent amendments thereof, thus rendering some proceeding of the corporation of doubtful validity.

OF BY-LAWS

The usual formalities, technical notices, and difficulties in getting a formal meeting of the board of directors cause more annoyance, probably, than any other one matter in the carrying on of a corporation. Notice of all regular meetings should be dispensed with. It has become the custom of many corporations to appoint, by the by-laws, a regular meeting of the board for every business day; if there should be no business there is no meeting, but if there should be business to do its transaction is not delayed for a long time and until the formalities and delay of calling a special meeting can be overcome.

A reasonable provision as to dividends should be made. Often grievous wrongs and oppressions are imposed by the majority upon the minority of stockholders by the withholding of dividends on some specious pretext, usually for the purpose of inducing or forcing the minority to sacrifice its interests in the corporation.

It is the writer's opinion that the by-laws should not be divided into articles; so doing creates difficulty in finding and citing the sections desired. It serves no useful purpose, for amendments by adding new sections usually require the new section to be designated by a letter of the alphabet also (as 5a, for example), the same as if the sections are numbered consecutively.

The form suggested herein is made very simple. Nothing herein is required by law; it is merely a suggestion of what has usually been found convenient and desirable. Where the necessities of the corporation require more extended provisions or regulations, the form may be easily elaborated. The parts inclosed in brackets [ ] are suggestions for filling in spaces which otherwise would be left blank in this general form.

BY-LAWS

(Short form)

MEETINGS OF STOCKHOLDERS

SECTION 1. The annual meeting of stockholders shall be held on the [first Tuesday of December in each year, at the hour of eleven o'clock in the forenoon of said day]; if said day should be a legal holiday, such meeting shall be held at the same hour on the next succeeding day which is not a legal holiday.

SEC. 2. Notice of all regular meetings of stockholders is dispensed with.

SEC. 3. In order to preserve the secrecy of the voting, separate blank ballots for [thousands, and hundreds, and tens, and one] shares of stock shall be prepared by the secretary and be delivered to the voter, and every vote shall be cast on such ballots.

SEC. 4. Special meetings of the stockholders may be called at any time by the president, or by two of the directors, or by the holders of twenty per cent of the shares of stock of the company, and all such calls shall state the purpose of the meeting, and such meeting shall have no power to do any business not stated in the call therefor.

SEC. 5. Notice of the day, hour and place of all special meetings of stockholders shall be given by the parties making the call causing to be delivered, [three] days before the time appointed for such meeting, a written or printed, or partially written and partially printed, notice thereof to the stockholder personally; or such notice may be addressed to the stockholder at his address as it appears on the books of the company; or, if his address does not appear on the books of the company and is known to the person or persons making the call to such known address; or, if the stockholder's address does not appear upon the books of the company and is not known to the person or persons making the call it may be addressed to him at [San Francisco, California]. All notices not personally delivered to the stockholder must be inclosed in a sealed envelope, addressed as above provided, and be deposited in the United States mails, postage prepaid, at least [five] days before the day appointed for such meeting.

OF TRUST DEED

ARTICLE XVIII

Trustee has no responsibility as to execution or recordation of mortgage

The company further hereby covenants and agrees to cause this mortgage or deed of trust to be duly and properly filed for record in the office of the county recorder of said City and County of San Francisco, State of California, with all convenient speed, and the said trustee shall have no responsibility as to the execution, acknowledgment or recording of this mortgage or deed of trust as a deed of trust or mortgage or conveyance of real or personal property, or as to any other act which may be suitable or proper to be done for the continuing of the lien of this mortgage or deed of trust, or for giving notice of the existence of the lien thereof.

ARTICLE XIX

Concerning the Trustee

THE TRUSTEE shall not be answerable for, or by reason of, any recital contained herein, or any fact or occurrence mentioned or referred to in any such recital (but any such recital shall be taken as a statement of the company, for the truth and validity whereof the trustee is not responsible), or for the doing or omission of any act or thing necessary to give validity hereto, or to any bond to be issued hereunder, save only the certification and delivery of bonds as herein provided.

THE TRUSTEE shall not be answerable for, or by reason of, the selection or appointment of, or the deposit of moneys with, or the solvency or financial responsibility, or the conduct, in any particular, of any depositary other than the trustee itself, or for the default or misconduct of any agent, appraiser, or attorney appointed by it in pursuance hereof, if such appraiser, agent, or attorney be selected with reasonable care; or for the title to or value of any property constituting the security hereunder, or any part thereof, or with respect whereof bonds shall be certified hereunder; or for the disposition of any bonds or the disposition or application of the proceeds of any thereof, after such proceeds shall have been withdrawn from deposit with the trustee, if they have been so deposited; or for the investment at interest of, or for interest upon, any moneys held or controlled by it hereunder, unless it shall have agreed, expressly, to pay interest upon such money held by it, and then only to the extent so agreed.

OF TRUST DEED

THE TRUSTEE shall not be answerable for the payment of any taxes levied upon the property of the company or upon the interest of the trustee therein, or the bondholders, collectively or severally hereunder, or upon any of the bonds secured hereby, or for the effecting or renewing of insurance upon any of the property subject hereto, or for the solvency or financial responsibility of any insurer; or for the authenticity of any bond, debenture, certificate of stock, or other security, except the bonds certified by the trustee pursuant to this indenture, or for any resolution, certificate, opinion, conveyance, assignment, transfer, affidavit, appointment, order, approval, report, statement, notice, request, waiver, consent, or other paper or document, or any signature received or passed by it hereunder, and believed by it to be, or relied upon by any person or persons reading it as genuine and to have been issued, passed, made, signed or executed, as the case may be, by the proper party or parties.

THE TRUSTEE shall not be answerable for, or by reason of, anything whatever, in connection with this trust, except its own willful misconduct or gross negligence. The trustee assumes no responsibility as to the validity of this deed of trust or mortgage, or of the bonds to be issued thereunder, nor as to the amount and extent of the security afforded by the property covered by this indenture; nor for any breach of any covenants thereof by the company, nor as to the application of any of the bonds certified and delivered to the company, or the proceeds of any of them, for any of the purposes herein expressed, or for the use and disposition of said bonds, or the proceeds thereof,

THE TRUSTEE shall not be personally liable for debts contracted by it, or for damage to persons or property injured, or for salaries, or for non-fulfillment of contracts during any period wherein the trustee shall manage the trust property upon entry or voluntary surrender as herein provided.

THE TRUSTEE shall not be under any obligation to take any action toward the execution or enforcement of the trust hereby created, or for the enforcement of any agreement or lease pledged hereunder, which, in its opinion, will be likely to involve it in expense or liability, unless one or more of the

holders of the bonds hereby secured shall, as often as required by the trustee, furnish reasonable indemnity satisfactory to it against such expenses or liability. Nor shall the trustee be required to take notice of any default (whether herein or under any agreement or lease) unless notified in writing of such default by the holders of bonds hereby secured then outstanding, or to take any action in respect to any default unless requested in writing to take action in respect thereof by the holders of more than fifty (50) per cent of the bonds hereby secured and then outstanding, and tendered indemnity as aforesaid, anything herein contained to the contrary notwithstanding. But neither any such notice or request, nor any provision therefor contained in this indenture shall affect any discretion herein given to the trustee to determine whether or not it shall take any action in respect to such default, or take action without such request.

THE TRUSTEE shall not be answerable for the recording of this indenture as a mortgage, deed of trust, or a chattel mortgage.

THE TRUSTEE shall be protected in any action taken by it upon any resolution, opinion, certificate, conveyance, assignment, transfer, affidavit, appointment, order, approval, report, statement, notice, request, consent, or other paper or document, or any signature believed by it to be genuine, and to have been passed or signed by the proper parties; and the trustee, if in any case it elect to take the opinion of any counsel satisfactory to it, may rely upon and be protected by such opinion as to the sufficiency and regularity hereunder of any such, or any, instrument or paper, or of any opinion, act or proceeding, but it shall not be required to take such opinion in any case, and its failure so to do shall not be deemed to create or establish any presumption of want of care.

Trustee entitled to compensation and reimbursement for outlays

THE TRUSTEE shall be entitled to reasonable compensation for all services rendered by it, and reimbursement of its reasonable expenses, including counsel fees, and the reasonable compensation of its servants and agents incurred in the execution of the trusts hereby created and in the exercise and performance of any of its powers and duties hereunder, and shall have a first lien upon the mortgaged property for all such compen-

sation and reimbursement, and also to indemnify it for, and to hold it harmless against, any liability or expense resulting from the fact that it shall have taken in its, or transferred in its name, the certificate for any stock or title to any bond or debenture subject to this indenture, as well as the cost and expense of defending against any claim or liability in the premises of any nature whatsoever.

THE TRUSTEE shall not be answerable for the custody or safekeeping of any share of stock, bond, or other personal property not transferred and actually delivered to it notwithstanding any recital or declaration herein to the contrary.

Acceptance of Trust by Trustee

The said trustee hereby accepts the trust in the said mortgage or deed of trust declared and provided and agrees to perform the same upon the terms and conditions hereinbefore set forth.

IN WITNESS WHEREOF the parties hereto have hereunto and to a duplicate hereof caused their respective corporate names to be subscribed and their respective corporate seals to be affixed by their respective officers thereunto duly authorized, the day and year first above written.

[SEAL] EQUITABLE LIGHT AND POWER COMPANY,

By.....

President.

By.....

Secretary.

UNION TRUST COMPANY OF SAN FRANCISCO,

By.....

Vice President.

By.....

Secretary.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

On this.....day of May, in the year one thousand nine hundred and ten, before me, ..., a notary public, in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the president, and....., known to me to be the secretary of the Equitable Light and Power Com-

pany, one of the corporations that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

On this.....day of May, in the year one thousand nine hundred and ten, before me, ..., a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared ..... and ....., known to me to be vice president and secretary respectively of the Union Trust Company of San Francisco, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the said corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county and state aforesaid, the day and year in this certificate first above written.

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the president of Equitable Light and Power Company, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is

made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the president of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of .....,19....

[SEAL] .....,

Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the secretary of Equitable Light and Power Company, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the secretary of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of .....,19....

[SEAL] .....,

Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the vice president of Union Trust Company of San Francisco, a corporation organized and

existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the vice president of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of ....., 19....

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

....., being first duly sworn, deposes and says: That he is the secretary of Union Trust Company of San Francisco, a corporation organized and existing under and by virtue of the laws of the State of California; that the annexed and preceding mortgage or deed of trust is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

This affidavit is made by the secretary of said company on its behalf and for the purpose of complying with the provisions of section 2957 of the Civil Code of the State of California, relating to mortgages of personal property in the State of California.

.....

Subscribed and sworn to before me this.....day of ....., 19....

[SEAL] .....,
Notary Public in and for the City and County of San Francisco, State of California.

BY-LAWS

By-laws should be as simple and brief as the necessities of the corporation permit; otherwise unnecessary labor, complications, and confusions may be created.

It is not necessary or advisable to have them state the number of directors which the corporation shall have (that is fixed by the Articles of Incorporation); nor the power of the board of directors; nor that the directors shall be chosen from the stockholders; nor that a majority of the directors shall be residents of this state; nor that a majority thereof shall constitute a quorum; nor that the president must be a director—all of those matters are regulated by law (Civil Code, sections 305 and 308); nor is it necessary to state where the meetings must be held; nor that the holder of each share of stock is entitled to one vote either personally or by his proxy; nor that elections by stockholders shall be by ballot; nor what shall constitute a quorum of the stockholders; nor that stock must stand on the books of the corporation in the name of the person offering to vote the same for ten days prior to the election; nor that if a quorum be not present, stockholders' meetings may be adjourned from day to day, and that the reason for such adjournment must be recorded in the journal of the proceedings of the board of directors(!); nor provisions concerning consent of stockholders to the meeting—all these things are covered, and made unchangeable, by the law contained in Civil Code, sections 290, 307, 312, 314, 317, 319, and, in some special matters, in other sections. Attempting to cover such things in the by-laws is likely to fail in some respect, or to make some provision in them in conflict with the statutes, or subsequent amendments thereof, thus rendering some proceeding of the corporation of doubtful validity.

CONSTITUTION—COPIES AND CITATIONS *(Continued)*

(Sections copied in full are found on pages indicated by black figures)

Article 13, section 1—**638**, 640.
Article 13, section 4—638.
Article 13, section 14—660.
Article 22, section 1—425.

CIVIL CODE—COPIES AND CITATIONS

(Sections copied in full are found on pages indicated by black figures)

Section 11—229.
Section 283—**15**.
Section 284—**16**.
Section 285—**16**, 17.
Section 286—**16**, 17.
Section 287—17, 646.
Section 288—17, 646.
Section 289—**19**, 52.
Section 290—**19**, 23, 33, **41**, 70, **176**, 361, **414**, **548**. 631, 722.
Section 290a—46.
Section 290½—23, **46**.
Section 291—48.
Section 292—21, **48**, 722.
Section 293—48.
Section 294—48.
Section 295—48.
Section 296—5, 23, 25, 27, **50**, **59**.
Section 297—**58**.
Section 297a—58.
Section 298—**371**.
Section 299—37, 52, **53**, 54, 59, 89, 623, **624**, 732.
Section 300—646.
Section 300a—24, 545, 747.
Section 301—**147**, 156, 177, 179, 193, 235, 468.
Section 302—30, 156, **175**, 179, 195, 420.
Section 302a—**197**.
Section 303—150, **151**, 156, 177, 178, 204, 220, **224**, 299.
Section 304—148, 149, **162**.
Section 305—34, 153, 155, 157, 196, **206**, 295, **444**.
Section 306—176.

CIVIL CODE—COPIES AND CITATIONS *(Continued)*

(Sections copied in full are found on pages indicated by black figures)

Section 307—**167**, 220.
Section 308—196, 211, 217, 218, **219**, 220, 228, 232, 234.
Section 309—78, 111, 290, 404, 415, 425, **433**, 436, 439, 440, 442, 444, 446, 447, 448, 764.
Section 310—157, 192, 203, **235**, 293.
Section 311—**198**.
Section 312—150, 152, 154, 170, **182**, 187, 191, 192, 193, 200, 201, 236.
Section 313—190, **191**.
Section 314—177, 191, **192**.
Section 315—186, **199**, 233, 236, 237, 293, **296**.
Section 316—197, **419**.
Section 317—178, **195**, 196.
Section 318—**196**.
Section 319—152, **198**, 218, 223.
Section 320—225, 226, **230**, 231, **232**.
Section 320a—**234**.
Section 321—**503**.
Section 321a—29, **45**, 191, 725, 738.
Section 321b—155, 170, **173**, 181, 183, 189, 193.
Section 322—**360**, 362, 365, 368, 375, 377, 379, 383, 386, 389, 390, 392, 461, 465, 466, 609.
Section 323—**300**, 472.
Section 324—187, **306**, 318, 327, 335, 336, 374, 375, **577**, 642.
Section 325—**346**.
Section 326—310, **347**.
Section 327—**415**.
Section 328—**348**.
Section 329—**350**.
Section 331—372, 373, **452**, 457, 461, 462, **464**, 465, **466**, 469, 473, 480.
Section 332—238, 457, **475**, 479.
Section 333—**478**.
Section 334—375, **479**, 483, **496**.
Section 335—**480**, 483.
Section 336—**481**, 483.
Section 337—**482**, 496.

CIVIL CODE—COPIES AND CITATIONS *(Continued)*

(Sections copied in full are found on pages indicated by black figures)

Section 338—**483.**
Section 339—**483**, 490.
Section 340—**484.**
Section 341—**484.**
Section 342—**485.**
Section 343—**485.**
Section 344—184, 454, **486.**
Section 345—**489.**
Section 346—479, 487, **490.**
Section 347—490, **491.**
Section 348—**495.**
Section 349—461, 466, 484, 491, **495.**
Section 354—17, 27, **72**, 92, 161.
Section 355—17, **73.**
Section 356—103.
Section 357—**144.**
Section 358—**61**, 514, 515, 516.
Section 359—40, 88, 106, 111, **116**, 122, **123**, **124**, **125**, 223, 377, 437, 726, 729, **748.**
Section 360—77, **85.**
Section 361—30, **41**, 725, 729, 738.
Section 361a—89, 136, **137**, 425.
Section 362—24, 30, **35**, 40, **52**, **525**, **545**, **724**, **725**, **726**, 728.
Section 363—56.
Section 364—646.
Section 365—506.
Section 377—**499.**
Section 378—**504.**
Section 382—**507**, 526.
Section 383—11, **507.**
Section 388—**141.**
Section 389—**143.**
Section 390—**143.**
Section 391—142, **144.**
Section 392—**144.**
Section 393—**144.**
Section 399—**496.**

CIVIL CODE—COPIES AND CITATIONS *(Continued)*

(Sections copied in full are found on pages indicated by black figures)

Section 400—524, **528**, 533, 537, 539, 672.
Section 401—29, 30, **42**, 43, 44, 725, 734.
Section 403—**58**.
Section 404—12, **57**.
Section 405—**569**, **609**, 618, 624.
Section 406—543, **614**, 617.
Section 407—**631**.
Section 408—**52**, 560, 568, 623, 624, 627, 628, 629, **633**, 636, 656.
Section 409—**634**, 636, 649.
Section 410—55, 584, 616, 622, **634**.
Section 414—600.
Section 419—33.
Section 456—114.
Section 457—114.
Section 473—140, **142**.
Section 560—437.
Section 574—84.
Section 586—**681**.
Section 587—**681**.
Section 587a—133, 142, **681**.
Section 588—679, 680, **683**.
Section 589—680, **684**.
Section 590—680, **685**.
Section 598—611.
Section 653—719.
Section 1001—632.
Section 1163—**573**.
Section 1185—**579**.
Section 1190—**579**.
Section 1275—**86**.
Section 1572—422.
Section 2229—218.
Section 2230—218.
Section 2234—218.
Section 2309—279.
Section 2310—209, **279**.
Section 2311—292.

CIVIL CODE—COPIES AND CITATIONS *(Continued)*

(Sections copied in full are found on pages indicated by black figures)

Section 2322—218.
Section 3086—319.
Section 3087—303.
Section 3095—303.
Section 3336—317.
Section 3432—541.
Section 3442—140.
Section 3450—540.
Section 3452—541.

CODE CIVIL PROCEDURE—COPIES AND CITATIONS

(Sections copied in full are found on pages indicated by black figures)

Section 78—553.
Section 341—492.
Section 345—520.
Section 348—402, 404.
Section 359—**399**, 404, 408, 410, 411, 412.
Section 392—**553**, 558, 560, 564, 568.
Section 394—568.
Section 395—559, 560, 565, 567, 568, 626.
Section 400—558.
Section 410—**569**.
Section 411—**569**, 570, 610, 611, 613, 624.
Section 412—**569**, 618.
Section 446—**584**.
Section 473—613.
Section 531—518, **527**, 536.
Section 541—**575**.
Section 542—334, **575**.
Section 564—518, **527**, 533, 535, 537.
Section 565—518, **528**, 533, 537.
Section 688—142, 334, **575**, 576.
Section 726—474.
Section 803—63, 507, **510**, 533.
Section 809—512.
Section 949—203, 512.
Sections 1227 to 1234—41, **521**, **522**.
Section 1235—47, 526.
Sections 1275 to 1279—23, **545**, **546**, **547**, **548**, **725**, **747**.

POLITICAL CODE—COPIES AND CITATIONS

(Sections copied in full are found on pages indicated by black figures)

Section 416—**647**, 649.
Section 601—460.
Section 3607—640.
Section 3608—**639**, 640.

PENAL CODE—COPIES AND CITATIONS

(Sections copied in full are found on pages indicated by black figures)

Section 504—**428.**
Section 506—**429.**
Section 512—429.
Section 513—429.
Section 557—**431.**
Section 558—**432.**
Section 559—**432.**
Section 560—90, 110, **423, 434, 442.**
Section 561—**425.**
Section 562—**426.**
Section 563—**426**, 504.
Section 564—197, **419.**
Section 565—164, **503.**
Section 566—**427.**
Section 567—**427.**
Section 568—**427.**
Section 569—**427.**
Section 570—**428.**
Section 571—**428.**
Section 572—**428.**

ACTS OF THE LEGISLATURE—COPIES AND CITATIONS

(Sections copied in full are found on pages indicated by black figures)

Act 1853, page 88—223.
Act 1872, page 826—608.
Act 1876, page 70—34.
Act 1880, page 131, repealed Statutes 1905, page 74 —88, 139.
Act 1891, page 490—23.
Act 1897, page 424—23.
Act 1897, page 96—139.

ACTS OF THE LEGISLATURE—COPIES AND CITATIONS
(Continued)

(Sections copied in full are found on pages indicated by black figures)

Act 1899, page 111—608.
Act 1901, page 108—633.
Act 1901, page 629—25.
Act 1903, page 244—23.
Act 1905, page 232—23, **47.**
Act 1905, page 493—651.
Act 1905, page 557—163.
Act 1905, page 564—**38.**
Act 1905, page 587—685.
Act 1905, page 786—**420.**
Act 1906, page 71—58.
Act 1907, page 344—29, 30, **44.**
Act 1907, page 347—29.
Act 1907, page 562—23.
Act 1907, page 746—662.
Act 1909, page 300—23.
Act 1909, page 1078—**421.**
Act 1909, sections 12 and 12a—**23.**
Act 1911, page 318—190.
Act 1911, page 530—644, 673.
Act 1911, page 1112—**48.**
Act 1913, page 3—673 to 679.
Act 1913, page 615—673, 674, 678.
Act 1913, page 715—**687 to 697.**
Act 1913, page 1075—353.
Act 1915, page 422—633, 634, 649, **651 to 666.**
Act 1915, page 1135—**688.**

GENERAL INDEX

ACKNOWLEDGMENT OF INSTRUMENTS

Person taking must know, or have satisfactory evidence, that person making is officer he pretends to be, (C. C. 1185), 579.

Form of acknowledgment (C. C. 1190), 579.

Meaning of "execute," 579, 580.

Truth of certificate may be disputed, 580.

Notary public responsible if instrument forged, or for false impersonation, 580.

In re evidence to notary public, 580.

Definition of instrument, 580.

ACTIONS

See Attachment, Pleading, Specific Performance, Summons, Venue.

ACTS OF LEGISLATURE—STATUTES

For sections copied, and citations, see index preceding this one.

ADMINISTRATOR

May vote stock of deceased (C. C. 313), 191.

May give proxy (C. C. 321b), 174.

See Executors.

ARTICLES OF INCORPORATION

See Corporation—Formation.

Articles must set out, what (C. C. 290), 19.

Name of the corporation, 19, 23.

Name not to duplicate or resemble another, 19, 23, 25, 27.

Purposes for which formed, 15, 16, 19.

Place where its principal business is to be done, 19, 27, 28.

Term of existence, not exceeding fifty years, 19, 29.

Number of its directors (not less than three), 19, 30.

Names and residences of those appointed for first year, 19.

All of such directors must sign and acknowledge, 21, 48.

ARTICLES OF INCORPORATION—*(Continued)*
Must be signed by at least three persons, a majority of whom must be residents of this state (C. C. 292), 21, 48.
Amount of capital stock, 20, 31.
Number of shares, 20.
May classify into common and preferred, 20, 31, 32.
Must state number of shares of each kind, 20, 31, 32.
Must state nature of preference, 20, 31, 32.
No distinction as to voting power, 20.
No distinction as to statutory or constitutional liability, 20.
The amount actually subscribed, 20, 33, 34.
By whom subscribed, 20, 33, 34.
Signers are agents for stock subscribers, 33, 34.
Public service corporation Articles strictly construed, 21.
In other corporations substantial compliance sufficient, 22.
Not void by taking certain additional powers, 22, 23.
Not necessary for all stock subscribers to sign Articles, 33.
At common law no subscription necessary, 34.
All directors in Articles should be subscribers (C. C. 292), 21, 33, 34, 46, 48.
Must be subscribed by three or more persons, a majority of whom must be residents of this state (C. C. 292), 48.
If subscribed by three, though acknowledged by less, fatally defective, 48.
FILING
First filed with the county clerk (C. C. 296), 50.
Then certified copy with secretary of state (C. C. 296), 50.
Secretary of state will not file if name closely resembles name of another (C. C. 296), 50.
Secretary of state then issues certificate (C. C. 296), 50.
If not filed by secretary of state the association never becomes a corporation, 52.
If not filed in the county where it is to have its principal place of business, it never becomes a *de jure* corporation, 52.
How corrected, 56, 57.

ARTICLES OF INCORPORATION—*(Continued)*
If delivered to county clerk, who is also recorder and so files them, held valid, 52.
Certified copies of Articles and Amendments of both domestic and foreign to be filed also in each county where it has property (C. C. 299), 52, 53.
Penalty for failure to do so; can not maintain or defend actions relating thereto and for damages (C. C. 299), 53, 55.
But foreign corporations may defend (C. C. 410), 55, 56.
Evidence, copies of Articles (C. C. 297 and 299), 58, 59, 60.
Defects, if slight, not material, 60.
But this does not prohibit defending other kinds of actions, 54.
Nor prohibit the *commencement* of the action, 54.
If Articles filed before objection raised, sufficient, 55.
It is a matter of defense, 55.
Not necessary to allege filing in a complaint, 55.
Failure to comply with this section does not entail forfeiture of property or permanent loss of right of action or defense, 56.
Nor does this section apply to taking a mortgage in another country, 56.
If destroyed by fire, copies (C. C. 297a), 56.
AMENDING
By majority vote of directors and assent of two-thirds of stockholders (C. C. 362), 35.
To be certified by officers (C. C. 362), 35-37.
To be filed in certain places (C. C. 362), 37.
Failing to file—penalty (C. C. 362), 37.
To contain all necessary things (C. C. 362), 37.
Does not cure defects of original (C. C. 362), 37.
Can not increase or diminish capital (C. C. 362), 38.
Can not change name or principal place of business (C. C. 362), 38.
Can not extend existence (C. C. 362), 38.
Can not increase number of directors (C. C. 362), 38.
Can not decrease number of directors (C. C. 362), 38.

ARTICLES OF INCORPORATION—*(Continued)*
No acknowledgment required, 38.
Dividing capital into common and preferred stock is not an increase, 40.
May be done by amendment, 40.
Doubtful legality cured by acquiescence, 40.
Dissolution can not be made by distribution of assets, 525.
Acknowledgment of original does not have to be included in amendment, 49.
Should set out the entire Articles as amended, 49.
Amendments to be filed in same counties as originals (C. C. 299), 52, 53.
Withdrawal if filed in wrong county (C. C. 363), 56.
To liquidate partnerships, 441.
Officers can not be appointed in, 220.

AMENDING ARTICLES
See Articles of Incorporation.

ASSESSMENTS
Stock issued without valid consideration is void and not subject to assessment to pay debts, 113.
Upon subscriptions, 393 *et seq.*
Upon subscriptions court may levy, 393.
Corporation insolvent, assessments are collectible by suit only, 395.
But may be made by assessment, 395, 497.
After one-fourth of capital is subscribed, the directors may levy assessments upon the subscribed stock to pay expenses, conduct business, or pay debts (C. C. 331), 452.
May be levied on full paid shares, 452.
Proceedings on a "call," the same, 453.
Ordinarily can be levied only when corporation is solvent, 453.
If insolvent, directors may assess on unpaid subscriptions to pay debts, 453.
In such case shares can not be sold; collection made by suit, 453, 497.
In such cases courts of equity may order assessments, 453.

ASSESSMENTS—*(Continued)*
Bankruptcy courts have same power, 453, 497.
Bankruptcy courts selling claim, 453.
A *de facto* board may levy assessments, 454.
Can stock be made non-assessable? 454.
Legislature has no power, it is said, to do this, 455.
May be levied to make improvements, 458.
This liability in no way related to liability for debts of corporation, 456.
Levying to pay non-existing debt not a fraud, 459.
May levy in excess of limit in by-laws to pay debts, 459.
Meaning of "current expense" vague, 459, 460.
Levying illegal assessments not a ground for dissolving corporation, 460.
Distinction between statutory liability and liability to pay up to par, 460 *et seq.*, 386, 389, 468.
Funds realized on stockholders' liability not part of the assets, nor of the "trust fund," 460, 462.
Except as to the amount of the levy there is no difference in assessments on unpaid stock and full paid stock, 461.
Liability to assessment purely statutory, 462.
Proceedings are strictly construed, 462, 497.
Power of adjourned meeting, 462, 463.
Immaterial when debts were contracted, 459, 463.
One-fourth capital subscribed is a condition precedent (C. C. 331), 452, 464, 470.
Actual subscription not necessary; acceptance of certificates or other acts is sufficient, 464, 465.
Issuance of certificate not necessary, 465, 474.
Addition of "trustee" to name—effect of, 465.
Water company's stock may be assessed, 466.
Purchaser of unpaid stock liable to assessment, 467.
Even if bought from corporation which obtained under an assessment sale, 467.
Those whose names are on stock book only persons liable to assessment under these provisions, 467.
But assignment on books after levy does not release the assignor, 467.
Levies at adjourned meetings, 462, 463, 467.

ASSESSMENTS—*(Continued)*
Subscription contract may enlarge or otherwise affect powers of levy, 468, 469, 470.
Subscription in irregular form, 469.
By-law limiting the amount of a levy is void as to creditors, 469, 470.
On unequally paid stock, to be levied on that least paid up, 472, 477.
Otherwise to be equal on all shares, 472, 473.
Lien on shares for assessment, 472.
Lien does not prevent suit to compel payment up to par, 474.
Directors voting for estopped to contest validity, 474.
When a subscriber is not a stockholder, 474.
Contract by vendor of stock to protect it from assessment is valid, 475.
No single assessment may exceed 10 per cent of authorized capital (not subscribed capital) (C. C. 322), 475, 476.
For debts may be full amount unpaid on stock (C. C. 332), 475, 477.
Railroad and fire insurance companies (C. C. 332), 475, 478.
None can be levied while a portion of a previous one is unpaid (C. C. 333), 478.
Exceptions to this rule in certain cases (C. C. 333), 478.
No statute of limitation on right to levy, 476.
No limitation to number of assessments, 478.
If assessment rescinded another can be made, 479.
Contents of order of assessment (C. C. 334), 479.
If order fails to state where payable all proceedings thereafter void; proceedings strictly construed, 479.
New dates may be set (C. C. 346), 479, 490.
Publication of order—notice—form (C. C. 335), 480.
Statutory form sufficient though erroneous, 480.
Notice—service and publication of (C. C. 336), 481.
Actual notice sufficient, 481.
Delinquent notice—publication of—form (C. C. 337), 482.
Must begin at least fifteen days before sale (C. C. 339), 482, 483, 484.
If not so begun jurisdiction immediately ceases, 482, 484.

ASSESSMENTS—*(Continued)*
Newspapers in which published, 483.
Further contents of notice (C. C. 338), 483.
Must continue ten days excluding Sundays and holidays (C. C. 339), 483.
Must begin fifteen days before sale (C. C. 339), 483, 490.
If in a weekly paper two weeks, etc. (C. C. 339), 483.
By publication of delinquent and sale notice jurisdiction to sell is acquired (C. C. 340), 484.
Sale at public auction to highest bidder (C. C. 341 and 342), 484, 485.
At sale corporation acts as agent of stockholder, 485.
Purchaser acquires only stockholder's title, 485.
A director may purchase for personal benefit, 485.
A subsequent agreement by the director to hold same for benefit of corporation is void, 486.
In default of bidders stock purchased by corporation (C. C. 343), 485.
While owned by the corporation it is non-assessable (C. C. 343), 485.
Nor can dividends be declared on it (C. C. 343), 485.
By this sale to corporation assessment is paid (C. C. 343), 485.
Stock so purchased by corporation is held subject to control of stockholders (Note—Not of the directors) (C. C. 344), 486.
Majority of remaining shares is the majority of stock thereafter (C. C. 344), 486.
If board is illegally elected, and assessment invalid, sale is void, 487.
But sale may be made *de facto* board, 487.
Corporation can not defend suit for damages for wrongful sale on ground that stock has no value, 487.
Stock purchased by corporation ceases to exist, 487.
Stock bought by corporation at an assessment sale is not subject to execution, 487.
Nor can it be voted, 487, 488.
Such stock can be sold at less than par, 488.
Extensions of time of sale (C. C. 345), 489.
Altogether not more than thirty days (C. C. 345), 489.

ASSESSMENTS—*(Continued)*

Assessment not invalid for certain errors (C. C. 346), 490.

Errors of procedure only, assessment itself may be valid, 490.

Publication of notice of sale for only thirteen days not wholly void, 490.

But failure to make election to sue at proper time loses right, 490, 491.

Failure to make publications may not make the assessment itself void, 491.

In action by stockholder to recover stock on account of irregularity or defects in proceedings he must make certain tender, and begin suit within six months (C. C. 347), 491.

If sale was to an individual, tender must be made to the individual, 493.

The tender must also include interest (C. C. 347), 491, 492, 494.

And suit must be brought within six months of the sale (C. C. 347), 492.

Rights under this section founded on irregularities only, 492.

If there was no power, sale is void, 492.

Limitation on such a suit two years, 492.

Excusable neglect is good plea against corporation only, 493.

It is an irregularity only to reduce the assessment, 493.

Long acquiescence by stockholder may bar right to recovery, 493.

Justice of the peace may determine all issues if amount involved is less than $300, 494.

Measure of damages for conversion by corporation under erroneous sale is the actual value of the stock; not its par value, 494.

Pleading—all facts constituting invalidity must be set out, 494.

Proof of publications (C. C. 348), 495.

By-laws may provide for collecting by suits only, 461, 462, 476.

ASSESSMENTS—*(Continued)*
Directors may waive right to sell stock and elect to sue stockholder for the amount of the assessment, 466, and (C. C. 349), 495.
Order to collect can not be made before the assessment is delinquent (C. C. 349), 495.
As to loss of jurisdiction and right to sue, 496.
Suits to collect—allegations, 463.
Notices sent by mail presumed to have been received, 496.
And that they were sufficient, 496.
"South Mountain" doctrine doubted, 497.
Election to sue for amount waives right to sell stock, 495, 498.
Amount due on assessment may be attached or garnished by creditor of corporation, 498.
In case of insolvency of corporation, 497.

ATTACHMENT AND EXECUTION
Sheriff does not need to take shares into his possession, 334.
Purchaser at execution sale gets good title, 334.
Peculiar condition of law, 334 *et seq.*
Levy (until sale thereunder) seizes no right but debtors, 337.
But sale under conveys all title, 337.
Shares of stock subject to, by leaving with proper officer a copy of the writ and a notice that the stock is attached thereunder. Levied on by execution in the same manner (C. C. P. 541, 542, 688), 575.
A clerk in store of corporation is not a proper officer, 576.
Gross inadequacy of price on sale on execution will set sale aside, 576.
Not necessary for sheriff to have possession of the certificate at the sale or to deliver it, 576.
No right of innocent purchaser arises by the levy, simply, of the attachment or execution, 577.
In the meantime pledgee may demand transfer, 577.
But after sale, to innocent purchaser, pledgee's rights are gone, 334.
Dividends are held by the attachment, 577.
Foreign corporation a non-resident for purposes of this law, 630.

BANKING CORPORATIONS
By ordinary corporations prohibited (Const., art. 12, sec. 5; C. C. 356), 103.
Obscurity of decisions, 104, 105 and note.

BLUE SKY LAW
§ 1. Title of act, 687.
§ 2. (a) Definition of "investment company," 687.
(b) Definition of "security," 687.
(c) Definition of "investment broker," 687.
(d) Definition of "agent," 687.
(e) Definition of "sale," 688.
§ 3. Not applicable to certain corporations (Stats. 1915, p. 1135), 688.
§ 4. (a) Application for permission to sell securities, 688.
Filing fee, 688.
(b) Securities not for sale to public exempt, 689.
(c) Companies organized in other states, 689.
Attorney upon whom process may be served, 689.
Fee, 689.
§ 5. Commissioner to examine company's affairs before issuing certificate, 690.
Certificate not recommendation, 690.
Grounds for refusing certificate, 690.
Unlawful to issue securities without certificate, 690.
Stock to directors, 691.
Temporary permit, 691.
§ 6. Investment brokers' permit, 691.
Fee, 691.
§ 7. Certificates for investment brokers' agents, 691.
Fee, 692.
§ 8. Supervision and control of companies and brokers, 692.
Examination fee, 692.
§ 9. Advertisements, circulars, etc., 692.
§ 10. (a) Semi-annual reports, 693.
(b) Brokers' reports on securities, 693.
§ 11. Papers open to public inspection, 693.
§ 12. Appeal from commissioner's decision, 693.

BLUE SKY LAW—*(Continued)*
§ 13. Penalty for false statement, 694.
§ 14. Penalty for company violating act, 694.
§ 15. Penalty for person violating act, 694.
§ 16. Corporation department created, 695.
Salary, 695.
§ 17. Deputies, 695.
Compensation, 695.
Total expenditure, 695.
§ 18. Office of commissioner, 695.
§ 19. Corporation commission fund, 695.
§ 20. Seal, 696.
§ 21. Reports as evidence, 696.
§ 22. Constitutionality of act, 696.
§ 23. Repealing clause, 697.
§ 24. Appropriation, 697.
§ 25. In effect, 697.

BONDS
Fictitious void (Const., art. 12, sec. 11), 106.
Increase, consent at meeting of majority stock on sixty days' public notice, 106.
Clause *in re* "fictitious" self-executing, 108.
Clause *in re* "increase" not self-executing except as to notice, 108.
If any value given for them they are not fictitious as to stockholders, 109.
Notes and mortgages issued by corporations, 111.
If in excess of capital not invalid, 111, 446-451.
But directors liable, 111 (C. C. 309), 433.
Are not a "bonded indebtedness," 111, 450.
May pledge for any sum, 111.
May be sold at a discount, 115.
May be created or increased by two-thirds vote of *subscribed or issued* stock at meeting called of which notice has been published (C. C. 359, subdiv. 3), 116, 122.
Contents of notice, 117.
Notice must also be sent by mail to each stockholder (C. C. 359, subdiv. 4), 117.

BONDS—*(Continued)*

An *original issue* may be made by unanimous resolution of directors and written consent of two-thirds of the *subscribed or issued* stock, notice of resolution to be given by mail; if issued without consent of stockholders, may still be valid (C. C. 359, subdiv. 5), 118, 122, 123, 124.

Increase of stock or bonds can be made only at stockholders' meeting, 118.

Two or more corporations may create, or increase in like manner a consolidated indebtedness (C. C. 359, subdiv. 6), 119.

Certificate of increase (C. C. 359, subdivs. 7 and 8), 119.

Consolidated bonds may equal but not exceed the par value of the stock of both (C. C. 359, subdiv. 8), 120.

Certificates must be filed, where, 120.

Certificates conclusive proof, 120.

Notices to be published in papers if any provided in by-laws, 121.

Unanimous vote of directors on issue of bonds only of those present, 125.

Lack of resolution of directors can not be cured by subsequent ratification, 126.

Prima facie character of certificate yields to contents of original records, 126.

If resolution does not authorize payment of attorney's fees, such a provision is void, 127.

But if contained in approved form of mortgage, it is valid, 127.

Bonds not void because no power to make mortgage, 278.

Pledging instead of selling, 278.

Lost bonds before act of 1915, 340.

Suit against corporation for lost or destroyed bonds (C. C. 329), 350.

Certificate for original issue in excess of subscriptions to stock may be filed with secretary of state and bonds be issued as stock is subscribed, 450.

Notes not payable to order, although secured by a mortgage, are not a bonded debt, 450.

BY-LAWS
Within one month after filing Articles, by-laws must be adopted (C. C. 301), 147.
By assent of majority of subscribed stock if adopted at stockholders' meeting, 147.
Notice required of that meeting, 147.
Written assent of two-thirds of stock sufficient, 147.
Definition, 147.
Resolution, distinction, 147, 148.
Must meeting be special? 148.
Established or waived by custom, 149.
"New by-laws," *ipso facto,* repeal old, 149.
Not necessary for stockholder to sign to be bound, 149.
Independent of statute may provide for voting by proxy, 149, 188.
But by-law can not contravene statute, 149, 188, 189.
By-law void relieving stockholders of constitutional liability, 149.
By-law void as to creditors if provides for no assessments to pay stock up to par, 150, 469.
By-law void if retrospective, 150.
By-law void impairing existing obligations, 150.
By-law void restricting proxies to stockholders, 150, 189.
By-law void permitting stockholder to withdraw his capital, 444.
By-law signed before organization may bind stockholder, 150.
By-law concerning mortgaging or conveying does not cover leasing, 151.
Right to adopt inherent independent of statute, 148, 151.
A contract between stockholders and corporation, 151.
Corporation sole has no need of, 151.
What they may provide (C. C. 303), 151.
May cover other things, 152.
Misleading character of this section of the code, 152.
Time of meeting may be provided, 151, 153.
But meetings must be annual, 153.
May provide rules for conducting meetings, except of elections, 151, 154.
May create inspectors of election, 153.

BY-LAWS—*(Continued)*
Notice of all regular meetings may be dispensed with, 151, 154.
Notice, contents of, 154.
Quorum of stockholders, 154, 183.
By-laws may declare quorum (C. C. 303, 312), 151, 183.
Regulations concerning proxies, 151, 154.
Proxy may vote on every kind of question, 155.
Concerning qualification of directors subject to other provisions of code, 151, 155.
Same as to duties of directors, 151, 155, 160.
Notice of annual meeting—by-laws can not provide other than publication (confusion concerning), 156, 178, 179.
Fines and penalties, 151, 161.
Compensation of officers, not necessary for by-laws to fix, 157.
By-laws may designate newspapers for notices (C. C. 303), 151, 161.
Water company limiting water to stockholders, 161.
Creating lien on stock void as to purchaser, 161.
Must be certified and copied in book of by-laws (C. C. 304), 162, 163, 164.
Open to inspection of *public*, 162, 164.
Amending, 164, 165.
Amended at annual meeting, 162, 164.
Amended or at special meeting *called by directors* for that purpose, 162.
Amended by two-thirds subscribed stock, 162.
Amended or by two-thirds subscribed stock written assent, 162.
In like manner power to amend, etc., may be given to directors, 162.
And at regular meeting be revoked, 162.
Amendment to be copied in book of by-laws, 163.
Repeal with date to be noted in book of by-laws, 163.
Until copied can not be enforced except as to corporation and those having actual notice thereof, 163.
Stockholders held to know if they could find out by inquiry, 163.

BY-LAWS—*(Continued)*
Must be certified by majority of board of directors, 162, 163.
Generally for benefit of stockholders only, 165.
If ignored, waived as to third persons, 166.
Sometimes amount to a contract, 164, 165.
Control directors (C. C. 308), 219.
Effect of on contracts concerning real estate, 277.
Certain by-law does not enlarge powers of president, 277.
Certain by-law does not require secretary to sign notes, 282.
By-laws constitute powers of manager, 287.
By-laws may be waived by stockholders, 450.
May provide for collection of assessments by suit only, 461.
But restricting power of directors in collecting unpaid balances, invalid as to creditors, 462.

CAPITAL
Note given for stock is not (note), 110.
Capital and capital stock distinguished and defined, 436.
Of clubs may not be divided, 440.
Mining companies, 440.
Peculiar cases where dividends of capital were allowed, 441 *et seq.*

CAPITAL STOCK
See Stock.
No minimum amount required (C. C. 290), 20, 31, 32.
No requirement as to par value of shares, 32.
No maximum limitation, 32.
Common and preferred, 20, 31, 32.
Amount subscribed to be stated in Articles, 20, 33, 34.
No specific amount required to be subscribed before beginning business, 33.
Directors can not divide (C. C. 309), 433.
Can not be increased or diminished by amending Articles (C. C. 362), 38.
But may be divided, after all debts paid, on dissolution of corporation, 433.
Capital and capital stock distinguished and defined, 436.
Agreement by corporation to repurchase, 444.

CERTIFICATES OF STOCK
See Stock, under this sub-title.

CHINESE
The prohibition of constitution on employment of, is unconstitutional, 15.

CIVIL CODE
For sections copied or cited, see index preceding this one.

CLUBS
Social clubs are subject to an annual city license tax, 672.
Social clubs' capital may not be divided, 440.

CODE OF CIVIL PROCEDURE
For sections copied or cited, see index preceding this one.

COLLATERAL ATTACK
Due incorporation not subject to (C. C. 358), 61 *et seq.*
Irregularities in organization will not defeat corporation's right to maintain or defend suits, 64.
De facto corporation not liable to collateral attack, 22.
Right of foreign corporation to do business in state can not be raised in eminent domain proceedings, 65.
Defective certificate of organization or abortive attempt at organization not available, 65.
A mere trespasser can not, 66.
Nor one who has had benefit of contract.
The due organization may be inquired into, 68.
See *De Facto* Corporations.

CONSOLIDATION
No provisions for as to ordinary corporations, except mining, 132, 133.
Railroad and street car companies, 133.
New corporation purchasing all property of old takes it subject to all debts, 134.
New corporation taking over old can not exclude members of old, 22.

CONTRACTS
See Implied Contracts, 79, 92.
See *Ultra Vires*, 92 *et seq.*

CONSTITUTIONAL PROVISIONS
For sections copied or cited, see index preceding this one.
No special privileges or immunities, 10.
No special law releasing obligations to state, etc., 10.
No special law creating, 10.
All laws concerning may be changed, 10, 11.
But not to deprive it of right to due process of law (note), 11.
State can not impose special burdens (note), 11.
This section (art. 12, sec. 1) not applicable to public corporations (note), 11.
State may investigate corporations (note), 11.
State can not lend aid or credit to, 12.

CONVERSION BY CORPORATION
Liable for on refusal to transfer, 90, 314, 316.
Measure of damages, 317.
Results in actual diminution of capital, 90, 451.
But held not to be, 120, 451.

CONVEYANCE
By-law concerning does not cover leasing, 151.

CORPORATION—FORMATION
See Articles of Incorporation.
No special law, all to be general, 10.
No special privileges, 10.
No release of obligations to state, etc., 10.
All laws concerning same may be changed, 10, 11.
State can not be interested in, 13.
Before the codes, 18.
Must be formed under general laws (Const., art. 12, sec. 1), 10, 11.
All shares alike if no preferred, 19.
Articles of association, 19.
Errors in organization, still a *de facto* corporation, 21, 22.
If Articles never signed, 62, 63.
Power of legislature to dissolve, etc. (C. C. 404), 57.
Power of legislature to alter and repeal laws (Const., art. 12, sec. 21), 10.

CORPORATION—FORMATION—*(Continued)*
When Articles destroyed by fire, copies may be filed (C. C. 297a), 58.
Failure to organize, elect officers, carry on business (see Forfeiture), 61, 63.
May be dissolved for, at suit of state, at instance of creditor, 61, 63.
Resumption of business a bar, 61.
Incorporation can not be questioned collaterally, 61.
Commencing business—record books some evidence, 64, 504.
For any purpose for which individuals may associate themselves, 15, 16.
Limited to those set out (C. C. 354, 355), 17, 22, 72.
Articles must be signed and acknowledged (C. C. 289) and set out purposes, 19.
Distinguished from powers, 17.
See Articles of Incorporation.
One corporation controlling another to its advantage, 267, 268.
Is a person, 622, 623.
Exchanging stock for stock of another a crime (Pen. C. 560), 423.
Organized before codes, 18, 346.
Banking corporations having no capital, 646.
Owning franchises in foreign country, 646.
Consolidation usually can not be done, 132-135.
Consolidation of mining companies (C. C. 587a), 681.
Consolidation of railroads and street railroads, 133, 135, 140.
Conveying all property to another, 140.

CORPORATION—POWERS
Judge Dillon's celebrated aphorism, 4.
Strict construction, 7.
No natural right (note), 11.
Can not infringe on rights of individuals (Const., art. 12, sec. 8), 15.
Distinguished from purposes, 17.
Organized for any purpose lawful, 16, 17.

CORPORATION—POWERS—*(Continued)*
No powers not expressly granted, 17, 22, 72, 75, 93.
Must not purchase or own property in any county when a copy of Articles not filed (C. C. 299), 53.
Statutory (C. C. 354 and 355), 72.
Of succession, 72, 80.
To sue and be sued, 72, 80.
To seal, 72-80.
To purchase and hold necessary property, 72.
To appoint officers and agents.
To make by-laws.
To sell stock on installments.
To sell stock on assessments.
To make necessary contracts.
No other powers except those necessary to exercise the statutory powers, 72, 73.
Sundry decisions on subject, 72 *et seq.*
Can not hold land in joint tenancy, 74.
Whether "essential" usually for directors to determine, 75.
Sundry instances, 75, 76.
Holding land, 76, 77, 84, 85, 86, 87, 210.
Contracts same as of individuals, 77.
Ratification and estoppel, 77.
May assign choses in action, 78.
May create debt in excess of capital, remedy against the directors, 78.
May appoint sole agent with limitations, 78.
May purchase franchises from individuals, 79.
Can not ordinarily take under will (C. C. 1275), 86.
As to real estate, 84-89.
Holding stock in other corporations, see that subject, 63, 89-91.
Ultra vires to buy its own stock, 90.
Ultra vires, generally, 92.
Banking by ordinary corporations prohibited (Const., art. 12, sec. 5; C. C. 356), 103.
Obscurity of decisions, 103 and note.
Corporations to liquidate partnership, 441.

CORPORATION—POWERS—*(Continued)*
Exchanging stock for another stock a crime (Pen. C. 560), 423.
To repurchase its own stock, 444, 451.

CORPORATIONS—GENERALLY
Origin, 1.
At first aggregate and political, 1.
Definition (C. C. 283), 1, 15.
In England first granted by the crown; now by parliament only, 2.
Powers, generally, 3.
"Not simply convenient but indispensable," 4.
Now created by the people, 4.
Civil Code, sec. 296, 5.
Early California definition, virtually a partnership, 5.
Dartmouth College case, 6.
Strict construction of powers, 7.
The "Chater" decision, 8.
See Public Corporations.

CREDITOR
As stockholder controlling corporation getting advantage, 267.
Being also stockholder—rights and liability, 392, 394.
Holding security, still may enforce stockholder's liability, 394.

CREDITOR'S BILLS
To enforce payment of subscriptions, 391, 393.
To enforce director's liability, 417, 418.

CRIMES
See Frauds.
See Directors and Officers.
See Subscriptions for Stock.

DEBTS
Directors must not create beyond subscribed capital (C. C. 309), 433.
Under public utilities act, rule inapplicable, 446.
Directors liable for excess (C. C. 309), 433.
Conflicting decisions, 447.

DEBTS—*(Continued)*
No statute of limitation on such suit (C. C. 309), 433.
Section penal and to be strictly construed, 446.
None of the capital need be paid up; it is sufficient if subscribed, 446.
Such excessive debt is not void, 446, 448.
Certificate for excessive debt may be filed with secretary of state, but bonds should not issue faster than subscription to stock, 450.
Consolidation of debts of several corporations (C. C. 359), 119, 132.

DECEASED PERSONS
Stock of voted by administrator (C. C. 313), 191.

DECREASE OF STOCK
See Stock, same sub-title.

DE FACTO CORPORATIONS
Defined, 68, 69.
Existence can be assailed only by the state in *quo warranto*, 6, 69.
Not *de facto* if organized under an unconstitutional law, 6.
If errors in organization, still *de facto*, 21, 22.
After sixteen years' existence is, 22.
If acknowledged by less than three persons, 49.
Existence can not be questioned collaterally (C. C. 358), 64, 97.
Not even by state, if doing business ten years (C. C. 358), 64.
Failure of directors named in Articles to meet or act, corporation not even *de facto*, 62, 63.
Defective certificate, or abortive attempt at organization, corporation still *de facto*, 65.
In criminal cases existence proved by *reputation*, 65.
May do anything a *de jure* corporation may do, 65.
Recognition by community a factor in proof of existence, 66.
Receipt for money evidence of, between the parties, 66.
Due organization may be inquired into, 68.
A mere trespasser can not question existence, 66.

DE FACTO CORPORATIONS—*(Continued)*
Nor one who has had benefit of contract, 66, 67.
Sufficient to sustain charge of embezzlement, 67.
Ceasing to do business does not dissolve, 517.
Existence of, can be assailed only by the attorney general (note), 513.

DE FACTO DIRECTORS
Status, or character, 211.
Note to themselves void, but may have *quantum meruit*, 270, 271.
Directors elected at irregular meeting are *de facto* directors, 157.
Trustees to liquidate in case of forfeiture under old and new "license tax," 655, 661, 671.
See Directors, for further instances and validity of acts.

DE JURE EXISTENCE
Slight defects in organization will not make proceedings void, 21.
If Articles not filed in county of residence, corporation does not have, 27, 28.
If Articles are acknowledged by less than three persons, corporation not *de jure*, 48, 49.
If Articles not filed in county of principal place of business, corporation never becomes *de jure*, 52.
Same if not filed with secretary of state, 52.
Failure of directors named in Articles to meet or act, corporation not *de jure*, 62, 63.

DIRECTORS
Any number not less than three (C. C. 290), 19, 30; (C. C. 305), 206.
Residence of those for first year must be stated in Articles (C. C. 290), 19, 30.
Have full power to make contracts, 256.
Successors of first not elected until annual meeting, 30.
Directors control corporation (C. C. 305), 206, 207.
May be increased or diminished (C. C. 361), 41.
But not by amending Articles (C. C. 362), 30, 38.
On organization, error to elect new directors, 30.

DIRECTORS—*(Continued)*
Must be stockholder (C. C. 305), 34, 206, 211.
Majority must be residents of state (C. C. 305), 206.
Subscription sufficient, 34.
Liable for creating excess indebtedness, 78; (C. C. 309), 433, 446.
By-laws may fix amount of stock necessary to qualify director (C. C. 305), 206.
If a director is interested in matter, he can not be counted to make a quorum, 212, 223.
Not less than a majority, 136a, 137, 138; (C. C. 305), 206; (C. C. 308), 221.
Having an interest can not vote, 212.
Having an interest, contract void or voidable, 212.
If stock they hold invalid, or if elected at irregular meeting, still they are *de facto* directors, 156, 157.
No salary if not fixed in by-laws or by a previous board, 157, 159.
Can not vote themselves salaries, 160, 214.
In special case, a *quantum meruit*, 157, 214.
That stockholders can not ratify intimated, 214.
Nor vote compensation to another for performing some of director's duties, 158.
To be elected at stockholders' meeting (Const., art. 12, sec. 12; C. C. 307), 167, 196.
Vacancies filled by appointment of board (C. C. 305), 206.
Vacancies may be filled by stockholders' meeting (C. C. 308), 196, 219.
Election and appointment distinguished, 169, 220.
All directors must be elected at one time, 171.
Election must be annual (C. C. 302), 175.
If by-laws fix no date, to be first Tuesday of June, 175.
Notice to be published same as for by-laws, 175, 177.
Notice must state hour, day and place, 175, 178.
In absence of proof presumed proper notice given, 178.
Court may appoint some one to make call, 178.
In lieu of notice all stockholders must waive notice, 178, 234.
Unless all stockholders waive notice (code), 175, 178.

DIRECTORS—*(Continued)*
Appointed in Articles hold until annual election; tenure of office one year the effect of annual election statute, 176.
Old law, that they should be elected at first meeting, repealed, 176.
Holding over, 176.
Meeting for election, 175-179.
Failure to elect may call another meeting (C. C. 314), 177, 192.
Election by pooled stock and voting trusts, 179.
If removed, same meeting elects new board (C. C. 310), 235.
At special meeting notice to state purpose, 191, 192.
Must meet at office or principal place of business (C. C. 319), 198.
Justice of peace may order election (C. C. 311), 198.
Superior court may remove by setting aside election (C. C. 315), 199.
Superior court may decide election disputes, 199.
Appeal—effect of, 202.
When term begins—effect of a by-law, 203.
Pooling stock to vote for, legal, 164-169, 179.
If quorum not present and voting, no act or business can be done (C. C. 305), 206, 211, 223, 463.
Business controlled by directors (C. C. 305), 206, 211.
Exception, one person owning all the stock, 207, 208.
Can not ratify note given by officers when no debt due, 210.
Stockholders can not do what directors can not do, 210.
Directors only body who can hire employees in absence of them delegating authority, 210.
Owning no stock not *de jure* director, 202, 211.
Not accepting office does not become *de facto* director, 211.
After selling stock becomes *de facto* director, 211.
Holding over after term becomes *de facto* director, 211.
May purchase stock at judicial sale, 213.
May purchase stock at assessment sale, 213.
Corporation may be estopped to object, 213.
Increased number invalid, yet *de facto*, 214.

DIRECTORS—*(Continued)*
Two corporations having same directors, contracts between not void but voidable, 215.
Same stockholders, 216.
Can not buy up claims for themselves if corporation is insolvent, 216.
Resignation to take effect on acceptance, 216.
Injunctions against—rarely issued, 216.
Meetings—must be duly assembled, 217, 223, 225; (C. C. 308), 219.
Vacancies do not affect validity of proceedings if quorum present, 217.
Place of meeting at principal office, 218.
Are trustees, 218, 415.
Holding over, same fidelity required, 219.
Acts of *de facto* board valid, 219.
Must organize immediately after election (C. C. 308), 219.
Must elect officers, 219.
Must perform all duties required by by-laws, 219.
President must be a director, 219.
Calls for meetings (C. C. 320), 225, 230, 231, 232.
Two directors can not call meeting, 226.
Notice of meetings, 225, 226, 227, 228, 233, 234.
Notice of meetings need not state purpose, 232, 233.
Notice of meetings ordinarily to be given by secretary, 232.
Adjournment not naming hour, new notice necessary, 226, 227.
Mandamus to make call, 232.
Time for on holiday, secretary can not adjourn till next day, 227, 229.
Adjourned meeting can do no business that the original could not have done, 227, 228, 229, 463.
Presumption legally assembled, 230, 231, 234.
Waiving notice of meeting (C. C. 320a), 234.
One holding less shares than the by-laws require not elected—next below is, 203.
Term as affected by a provision of by-laws, 203.
Directors' issue of promissory notes to themselves void, but may have *quantum meruit*, 270.

DIRECTORS—*(Continued)*
Purchasing claims against corporation, 274, 277.
Transaction with corporation not *ipso facto* void, 267.
Authority under by-laws, 277.
Secret purchase of property, 275, 276.
Selling property to corporation, 276.
Purchasing property for—secret profits, 276.
Proving resolution by parol, 283.
Resolution passed but not recorded, authority, 285.
Ratification of acts, 277.
Must make no dividends except from profits (C. C. 309), 433.
Nor divide capital (C. C. 309), 433.
Nor increase or diminish capital stock except as elsewhere provided (C. C. 309), 433.
Are liable to corporation and creditors for capital so reduced and debts so contracted (C. C. 309), 433.
No statute of limitation on this liability (C. C. 309), 433.
But water and real estate company may divide water, etc. (C. C. 309), 433.
But capital, after payment of all debts, may be divided on the dissolution of corporation (C. C. 309), 434.
Voting for an assessment is estopped from denying its validity, 474.
Adjourned meetings, assessments, power of, 463.
Does not hold a public office, 512.
Are trustees to wind up (C. C. 400), 528, 661, 671.
As such trustees can be sued only on claim disallowed by them, 538.
Were trustees to liquidate in case of forfeiture under old "license tax" law, 655.
Removal of directors (C. C. 310), 235.
By a two-thirds vote of stockholders, 235.
Call for such meeting, 235.
Whole board must be removed, 235.
Majority of shareholders not equivalent to majority of stock, 236.
Court's power to remove doubtful, 237.
See Officers.

DIRECTORS—LIABILITY OF
Are trustees—same liability, 218, 415.
For embezzlements of officers (Const., art. 12, sec. 3), 415.
Embezzlement defined (Pen. C. 504 and 506), 428, 429, 430, 431.
Any contract relieving above liability is void (C. C. 327), 415.
Officers of *de facto* corporations subject to same liabilities and penalties as of *de jure*, 416.
Manager's liability in some cases, 419.
Misappropriation includes misapplication, 416, 417.
But not extravagant prices, 416.
Creditor's bill for benefit of all creditors, 417, 418.
Creditors not joining in suit do not benefit, 418.
Limitation of suit two or three years, 416.
Creditor's rights superior to stockholder's, 417.
Creditors must sue in equity in behalf of all, 417.
Not penal, but compensatory, 417.
Liability in nature of surety, 417.
Consent of all stockholders does not bar creditor's rights, 417.
Not necessary that creditor first reduce his claim to judgment, 417.
Right of action survives against estate of director (note), 417.
This provision is self-executory and not unconstitutional, 417.
Liability limited to "moneys" misappropriated, 418.
Manager liable for default of a bookkeeper, 418.
For untrue or exaggerated report or prospectuses is guilty of a felony (Stats. 1905, p. 786), 420.
Same (C. C. 316) liable; (Pen. C. 564) felony, 419.
A case of bank directors, 419.
Misleading advertisements or circulars and statements (Stats. 1905, p. 786; 1909, p. 786), 420, 421.
Errors of opinion, or mutual mistakes, 421, 422.
For false annual report to stockholders (C. C. 302a), 197.
Misconduct (Pen. C. 560), 423.
Unlawful dividends or creating excessive debt (C. C. 309; Pen. C. 560), 428, 433, 434.

DIRECTORS—LIABILITY OF—*(Continued)*
Dividing capital stock (C. C. 309; Pen. C. 560), 428, 433, 434.
Discounting notes in special cases (Pen. C. 560), 428.
Receiving or exchanging stock or bonds of another corporation for "like securities of his own corporation" (Pen. C. 560), 428.
Of savings bank overdrawing account (Pen. C. 561), 525.
Of savings bank receiving deposits when bank is insolvent, (Pen. C. 562), 526.
Wrongfully possessing property of corporation a felony (Pen. C. 563), 526.
Or falsifying or destroying books (Pen. C. 563), 426, 526.
Creating debt of railroad company in excess of resources a crime (Pen. C. 566), 427.
Directors are presumed to know affairs of corporation, so far as criminal statutes are concerned (Pen. C. 568), 427.
If present, unless dissent entered he is presumed to assent to action (Pen. C. 569), 427.
If absent, presumed to assent if he does not enter his dissent (Pen. C. 570), 428.
Above penal provisions applicable to officers of foreign corporations (Pen. C. 571), 428.
Director defined so far as above penal laws concerned (Pen. C. 572), 428.
Signing fictitious name to subscription to stock (Pen. C. 557, 558, 559) a crime, 431, 432.
Exhibiting false paper or book, or making false certificate to public officer (Pen. C. 558), 432.
For unearned dividends, creating excessive debts, and illegal increase of stock, etc. (C. C. 309), 433.

DIRECTORS' MEETINGS
Must organize immediately after election (C. C. 308), 219.
Of directors—must be assembled (C. C. 308), 206, 217, 219, 220.
Quorum, majority forms (C. C. 308), 219, 221.
By-laws concerning, 151 *et seq.*
Vacancy in board, may still be valid, 217.

DIRECTORS' MEETINGS—*(Continued)*
Directors must meet at "principal place of business," 25; (C. C. 319), 198, 218.
Calls, notice personal and publication, 225 *et seq.*
Directors can not call, when, 226.
Adjournment, if hour not named new call required, 226, 227.
Time for on holiday, secretary can not adjourn meeting to next day, 227.
If time for is on holiday, must be held on the holiday, 227.
Adjournment beyond time for regular meeting, 227.
Quorum (if by-laws so provide) may adjourn to later day, without notice, 228.
Minority has no power to adjourn, 227, 462, 463.
Adjourned meeting can do no business the original could not have done, 226, 227.
Calls to be on personal notice if no other provided in by-laws (C. C. 320), 225, 230.
Calls on order of president, 230.
Calls if no president, on order of two directors, 230.
Calls must be made by secretary, 230.
Presumption that meetings are regularly called and assembled, 230, 233.
Provisions of by-laws concerning call to be signed by proper officer, 231, 232.
Notice to be signed by secretary, 232.
Object of meeting—not necessary to state, 232, 233.
Call made by improper officer, meeting is not valid, 226, 232.
De facto directors may make valid call, 233.
Special meeting, no call, some absent is invalid, 233.
No presumption that meeting is special, 234.
Notices sent by mail sufficient, 234.
Notices, waiver of, 234.

DISSOLUTION
Legislature may dissolve corporations (C. C. 404), 57.
AT SUIT OF STATE ONLY, AT INSTANCE OF CREDITOR
For failing to organize and begin business within a year (C. C. 358), 61, 63, 515, 516.

DISSOLUTION—*(Continued)*
If it lose all of its property, 61, 63, 515, 516.
If it dispose of its property, 61, 63, 515, 516.
If it fail for two years to elect officers, 61, 63, 515, 516.
If it fail for two years to transact business, 61, 63, 515, 516.
Resumption of business a bar, 61, 63, 515, 516.
State barred after corporation doing business ten consecutive years, 61, 63, 515, 516.
Levying illegal assessments no ground for, 460.
Keeping record books evidence of commencement of business, 516.
INVOLUNTARY
Suit brought by attorney general, and
For usurping franchise of, and
De jure or *de facto* corporations (C. C. 803), 510.
Two classes of cases, 510.
Court can not compel attorney-general to bring suit, 510.
Private relator can not control suit, 510.
Usurping other franchises does not affect franchise to exist, 512.
Both civil and criminal in its nature, 512.
Burden of proof on corporation, 512.
Except where specific acts alleged, 512.
Illegal acts do not work forfeiture; there must be an adjudication, 513.
Except in cases where statute so declares, 513, 514.
Not declared for omitting a part of its name; or that its business was impractical; or carrying on a losing business; or refusing inspection of books; or levying an illegal assessment; or owning real property not essential; or misconduct of officers of public corporation, 514, 515.
In private corporation failure to perform duties may be ground for, 515.
In private corporation for misconduct of officers, 514.
The public must be injured, 515.
Case of lessee of corporation, 515.
For failure to organize (C. C., sec. 358), 61, 62, 63.

DISSOLUTION—*(Continued)*
If directors named in Articles never meet, no stock issued, etc., no corporation, 515.
Minute book evidence of commencement of existence, 516.
Non-user of franchise does not of itself terminate existence, 517.
A positive declaration of statute of forfeiture operates *eo instanti* in some cases, but usually a suit is necessary, 518.
Equity has no power to dissolve, 518, 530.
Court can not appoint receiver pending suit, or on dissolution, 518, 530.
Statute of limitations, 520.
Court can not distribute assets, 533.
Who necessary defendants, 518.
Directors as trustees have full power to wind up either in voluntary or involuntary dissolution, 524, 533.
When directors winding up may be sued, 538.
One such trustee can not act; a majority is required, Newhall v. Western Zinc Co., 164 Cal. 385.
Corporation's property not forfeited, 524.
Effect of decree of dissolution is to terminate the corporation's existence for every purpose, 524.
Suits brought by and against trustees, 525.
In suits to dissolve the corporation the only proper defendant, 518.
If to prevent resumption of franchise to exist, the persons doing so are the proper defendants, 519.
For failure to properly incorporate, 519.
No statute of limitation on suit involving franchise to exist, 520.
Taking too extensive powers, 520.
VOLUNTARY DISSOLUTION
By superior court only (C. C. P. 1228), 521.
Application must state, on vote of two-thirds of stock and all claims and demands paid (C. C. P. 1228), 521.

DISSOLUTION—*(Continued)*
Signed and verified by majority of directors (C. C. P. 1228), 521.
Publication thirty days (C. C. P. 1230), 522.
Judgment (copy) to be filed with secretary of state (C. C. P. 1232), 522.
If there are any unsatisfied claims, even contingent, can not be dissolved (C. C. P. 1228), 521, 523.
Judgment—no collateral attack, 523, 525.
On decree existence terminated for every purpose, 524.
Dissolution can not be made by directors distributing assets, 525.
Must be under these statutes, 525.
Directors are trustees to wind up, 528, 661, 671.
Amending Articles shortening period of existence now prohibited, 526.

DIVIDENDS
Can be made only from surplus profits (C. C. 309), 433.
Directors liable to corporation and creditors for amount of same (C. C. 309), 433.
No statute of limitation on suit to recover amount of same (C. C. 309), 433.
But water and real estate companies may divide water, etc. (C. C. 309), 433.
But conveyance subject to debts, 433.
Capital may be divided, after all debts paid, on dissolution of corporation (C. C. 309), 433.
This statute not applicable to mining companies, 440.
Dividends, otherwise, in the discretion of the directors, 434.
Dividends of mining companies proper although produced by exhaustion of its property, 434.
Profits defined, 434 *et seq.*
Net profits need not be divided, 438.
Go to stockholders of record, 438.
Pledgee entitled to, 439.
Declaring unearned dividends—directors liable, 433, 439.

DIVIDENDS—*(Continued)*
The prohibition of dividends except as above is for protection of stockholders and creditors, 439.
Capital a fund for creditors (see stock, a trust fund), 439.
Must be from money in hand, 440.
Corporation not for profit may not divide any part of its funds, 440.
By-law that stockholder may withdraw his capital, void, 440.
May be declared notwithstanding large debt, 440.
Cash from sale of property can not be divided, 440.
Peculiar cases where formed to liquidate partnership, 441.
Dividends contrary to above statutes not void, but attended with a certain liability, 442.
Dividend of capital where two persons own all the stock—a strange case, 443.
See Debts.
Nor can stockholders provide for such dividends by a by-law, 444.
Agreement by corporation to repurchase stock, 444.
In case stock is attached, 578.
Dividends payable to married woman (C. C. 325), 346.

ELECTIONS
See Voting.
See Stockholders' Meetings.
At election of directors cumulating vote (Const., art. 12, sec. 12) (C. C. 307), 167, 170.
At election of directors cumulating vote applies to foreign corporations, 168, 172.
Highest vote, not majority, determines, 168.
All directors must be elected on one vote, 171.
Conduct of—singular method allowed, 173.
Inspectors of elections, 153.
Defined, 169, 220.
Appointment defined, 169, 220.
Superior court may revise (C. C. 315), 199.
Who "aggrieved," 201.
Appeal, effect of, 202.
Not applicable to appointed ones to fill vacancy, 202.

ELECTIONS—*(Continued)*
Agreement to elect one, not enforceable, 202, 296.
One holding less shares than required by the by-laws not elected, but next below is, 203.
Holding no stock at election, can not qualify by subsequently buying stock, 203.
When term begins—effect of a by-law, 203.
Quorum majority subscribed stock (C. C. 312), 182, 183, 184.
Voter must be stockholder or proxy, 182.
Voter must have stock on books ten days before, 183, 186, 187.
Voter must be present personally or by proxy, 184.
Any violation of law, election voidable, 183, 193.
Treasury stock can not vote, 194.
Meeting may adjourn in certain cases, 183.
Mandamus to call election, 205.
Vendor votes until certificate transferred on books, 323.
By-laws may prescribe certain rules, 152 *et seq.*
Inspectors of elections, 153.
Who may vote (C. C. 312 and C. C. 321b), 173, 182.
Stockholders present, 173.
Stockholders represented by proxy, 173.
Proxy in writing—time limit, 173.
Proxy must be filed, 189.
If quorum not present, meeting may be adjourned (C. C. 312 and 314), 183, 191, 192.
Notice of meeting for election must state purpose, 191.
Elections to be annual (C. C. 302), 175.
Notice of meeting, unless all waive notice to be given by publication as in C. C. 301, 175 (147), 177, 178.
Meeting legal in case of certain waivers, etc. (C. C. 317 and C. C. 302), 175, 195.
Pooled stock and voting trusts—voting of, 179.
Who is stockholder for voting purposes, 184.
By-laws can not give right to holder of untransferred certificate, 187.
Proxies revocable (C. C. 321b), 174, 189.
Proxies may be limited in power, 190.
Pledgor or pledgee voting stock (C. C. 313), 190, 191.

ELECTIONS—*(Continued)*
Voting stock in one corporation held by another, 192.
Financial statement to be furnished at meeting (C. C. 302a), 197.
Elections must be held at office of company (C. C. 319), 198.
Justice of the peace may call (C. C. 311), 198.
Election disputes—superior court (C. C. 315), 199.
Executor may vote though stock not transferred on books to him, 191.
Surviving partner may vote though stock not transferred on books to him, 191.

EMBEZZLEMENT
De facto existence of corporation sufficient to sustain, 67, 430.
By officer, agent, etc., defined (Pen. C. 504, 506), 428, 429.
Voluntary act sufficient proof of intent, 429.
Intent to restore is no defense, 429.
Nor is restoration itself, 429.
Sundry cases, 429-431.

EMINENT DOMAIN
Property of corporation may be taken for public use, 15.

ESTOPPEL
Corporations stand on same footing as natural persons, 77.
One who has had benefit of contract can not question existence of corporation, 92.
The trustees who signed the Articles can not deny validity of the organization, 66.
Having received the proceeds of bonds corporation is estopped to deny validity, 124.
Corporation may be estopped to deny manager's contract with superintendent for salary, 160.
In pais—distinct from ratification, 209.
If contract still executory, corporation may dispute, 263.
By acts of officers, 289.
Owner estopped to dispute unlawful transfer, 342.
Owner ratifying unlawful transfer, 342.

ESTOPPEL—*(Continued)*
Stockholders can not avoid responsibility by refraining from making inquiry, 163, 290, 450.
Director voting for assessment can not contest its validity, 474.

EVIDENCE—ARTICLES
Certain copies, and certified copies of Articles are evidence (C. C. 299), 53.
Same (C. C. 297), 58.
But this proof may be overthrown by showing Articles not executed, 59.
If lost or destroyed secondary evidence of Articles may be introduced, 58.
Presumed, in absence of proof, that Articles provide for required number of directors, 209.

EXAMINATION
Must be made by attorney general or district attorney at the request of the governor; who must report result of same to the legislature (C. C. 382), 507.
Neither of these officers can make examination without such request, 507.
But may bring suit to annul franchise without such request, 507.
Legislature may examine (C. C. 383), 507.

EXECUTION
See Attachment and Execution.

EXECUTIVE COMMITTEE
Not provided for in statutes, 297.

EXECUTORS
Vote stock of deceased (C. C. 313), 191.
May give proxy (C. C. 321b), 174.
Not necessary for shares to be transferred on books to executor, to entitle him to vote, 191.

EXTENDING TERM OF EXISTENCE
Limited to fifty years, 29.
Can not be done by amending Articles (C. C. 362), 38.

EXTENDING TERM OF EXISTENCE—*(Continued)*
May be by vote or consent of two-thirds of stockholders (Const., art 12, sec. 7), 42, 43, 44.
Civil Code, sec. 401, probably repealed, 42, 43.

FEES FOR INCORPORATION
Of secretary of state for domestic (Pol. C. 416), 647.
Of secretary of state for foreign, 649, 652, 655.
How far unconstitutional? 649.

FICTITIOUS STOCK AND BONDS
See Stock—same sub-heading.

FILING
See Articles and Amendments.

FINES AND PENALTIES
For violation of by-laws, 151, 161.

FOREIGN CORPORATION
Must file copy of Articles with secretary of state, and in other places, same as domestic (C. C. 408 and C. C. 299), 53, 55, 633, 634, 651, 652.
Consequences and penalty of failure to file Articles, 53, 55, 634.
This failure does not prevent corporation defending suit, 635, 636.
This section does not apply to mortgages, 56.
Right to do business in state affecting right of eminent domain, 64.
Inspection of records, *quaere?* 70.
Holding election of directors in this state subject to law of cumulative voting (C. C. 307), 168, 172.
Mandamus against officer to perform duty, 204, 232, 680.
After right to do business in state expires trustees must wind up, 314.
Then they can not be compelled to transfer shares, 314.
Situs of stock, 308, 312.
Stockholders in, liable for debts the same as in domestic corporation (C. C. 322), 361, 382.
Limitation of suit to enforce liability (Colo.), 408.

FOREIGN CORPORATION—*(Continued)*
Officers of liable criminally same as of domestic corporations (Pen. C. 571), 428.
This state can not regulate internal affairs of, 606.
Can not do business on more *favorable conditions* than a domestic corporation (Const., art. 12, sec. 15), 382, 607, 631.
Foreign banks must publish condition, 608.
What is "doing business"? 608, 611.
Maintaining suit is not, 609.
If organization meeting in this state, validity can not be attacked collaterally, 609.
Service of process—designating person (C. C. 405), 609.
Proof of appointment necessary, 616.
Must do so at time of filing Articles with secretary of state, 610.
If no person so designated, process may be served on secretary of state, or managing agent, 609, 610, 611.
Not required to make such appointment until it so files its Articles, 610.
But law requiring appointment before corporation can maintain suit is unconstitutional, 636.
If no person is designated service may also be made on managing agent, 610.
Return of service must show what, 612.
But if such person is designated, service can not be made on secretary of state, 610.
But such a law is unconstitutional, 613.
Service by publication.
If not "doing business" in state service can not be made on secretary of state, 610.
Burden on plaintiff to show corporation is doing business in this state, 611, 634.
Ceasing to do business, service on former agent is void, 630.
Objection to service must be made, and by motion, 612, 614.
Return of service—what must show, 612.
Certificate of secretary of state does not aid sheriff's return, 612.

FOREIGN CORPORATION—*(Continued)*
Service on secretary of state constructive, not personal, 612.
One year in which to set aside default, 613.
Objection can not be made after trial, 613.
Law is constitutional, 613.
Designation of such agent may be revoked (C. C. 406), 615.
On death or removal of agent, must appoint a new one, 615.
Corporation failing to appoint such agent not entitled to benefit of statute of limitations (C. C. 406), 614, 615, 617, 618.
Nor can it maintain or defend any suit (C. C. 406) (but see pp. 615, 616).
Acting as a corporation sufficient (C. C. 406), 615.
If Articles not filed corporation may still defend actions, 615, 616.
To deny this right is unconstitutional, 616.
Being absent from state, *quære* as to statutes of limitations, 616, 617.
Must prove appointment of agent, 616.
Quære as to managing agent, 617.
General discussion of subject, 617 *et seq.*
Foreign corporation is a "person," 622, 623.
Maintaining action defined, 623.
If Articles filed when amended complaint is filed, it is in time, 623.
Ceasing to do business, service upon former agent void, 630.
Failure to file can be raised only by plea, 623.
Service upon agent sufficient—the two provisions not inconsistent, 624.
Meeting for elections, 625.
Taking a mortgage is not holding property, 624.
Court may appoint person to call meeting of directors, 625.
Assignments for benefit of creditors, 621, 625.
Imposing conditions not warranted by constitution, 625.
Situs of debt is same as that of the corporation, 625.

FOREIGN CORPORATION—*(Continued)*
Foreign corporation can not take benefit of state insolvent laws, 621.
Secretary refusing to call meeting, 625.
Legislature can not tax specially, 625.
Has no residence in state for purposes of venue of suits, 626, 630.
Under the attachment law is a non-resident, 630.
Venue of actions against, 568, 626-630.
Filing Articles does not make it a domestic corporation, 634.
Foreign corporations not being required to follow C. C. 290 is not granting them *more favorable conditions*, 631.
Foreign railway companies (C. C. 407), 631.
Foreign telegraph companies, 631.
Eminent domain, all have right (and note), 632.
Right to do business can be inquired into only by *quo warranto*, 632, 633.
Does not have to allege and prove that it has complied with law as to filing Articles—burden on other party, 611, 634.
Taxation of shares of stock, 643.
Real estate—new prohibition on holding (C. C. 410), 635, 636.
Effect of forfeiture of right to do business (note), 668.
Fees for doing business in state, 634, 652.
Foreign mining companies must allow inspection of mine, 680.

FORFEITURE OF FRANCHISE
Of any franchise—attorney general brings suit for, upon
His own information, or
Complaint of private party, or on
Demand of governor (C. C. 803), 510.
Court can not compel bringing of suit, 510.
Two classes of violation, 510.
Attorney general's powers and duties, 511.
Corporation may dispose of property during pendency of proceeding, 511.

FORFEITURE OF FRANCHISE—*(Continued)*
Forfeiture of public franchise does not affect franchise to exist, 512.
Proceeding is both civil and criminal, 512.
An appeal lies, 512.
Not necessary that corporation be *de jure*, 513.
Burden of proof, 513.
Requires judgment of court, 513.
Except where statute declares same, 513, 514.
Another method—suit by attorney general to dissolve, 514.
Foundation principle, a franchise is a trust, 515.
Officers violating duties, 514.
Legal proceedings necessary, 517.
Who are necessary defendants, 518.
Equity has no power to dissolve, 518.
Substantial compliance with law necessary defense, 519.
No statute of limitation if corporation continues usurpation of powers, 520.
Legislature can not waive forfeiture of *quasi* public corporations (Const., art. 12, sec. 7), 42.
Of franchises generally and franchise to exist, 62.
If it fails to organize and begin business for one year (C. C. 358), 61, 63, 515, 516.
If it loses all of its property (C. C. 358), 61, 63, 515, 516.
If it disposes of its property (C. C. 358), 61, 63, 515, 516.
If it fails for two years to elect officers (C. C. 358), 61, 63, 515, 516.
If it fails for two years to carry on business, 64 and (C. C. 358), 61, 63, 515, 516.
Corporation does not cease to exist because it ceases to do business; suit by state necessary, 517.
Commencing business—keeping minute book, etc., evidence, 64, 504, 516.
May be dissolved on suit by state, at the instance of a creditor, 61.
Resumption of business a bar, 61.
Can not be raised collaterally, 61.
State barred after corporation doing business ten consecutive years, 61.

FORFEITURE OF FRANCHISE—*(Continued)*
Under old "license law" if charter forfeited can not transfer stock, 666.
This tax is not one on property, but an excise (on U. S. Sup. Ct. decision), 667, 668.
Law works forfeiture *ipso facto*, 668.
No real discrimination between foreign and domestic corporations, 669.
Applied to holding corporation also, 670.
Directors were trustees to liquidate, 655, 661, 671.
Effect on foreign corporation doing business here (note), 672.
Under old "annual license tax," 653-655.
New "annual license tax" forfeiture provisions substantially same as in old law, 651 *et seq.*
Similar provisions under new franchise tax, 674.

FORMS
General object clauses, 699-703.
Special object clauses, 703-718.
Articles of Incorporation without capital stock, 719.
Articles of Incorporation with capital stock, 721.
Preferred stock clause, 723, 724.
Amending Articles, 724-732.
Extension of existence, 732-735.
Increasing or decreasing directors, 736, 737.
Removal of corporation's principal place of business, 738-742.
Change of name, 743-747.
Increasing capital stock, 747-756.
Increasing bonded indebtedness, 757.
Creating original bonded indebtedness, 758-763.
Diminishing capital stock, 764.
Calls for meetings, 765-769.
Waiver of notice of stockholders' meeting, 768.
Waiver of notice of directors' meeting, 769.
Proxy, 770.
Revocation of proxy, 770.
Designation of agent to receive service, 771.

FORMS—*(Continued)*
ASSESSMENTS
Resolution levying, 771.
Notice of, 772, 480.
Delinquent notice, 482, 772.
Delinquent sale notice, 482, 483, 772.
Resolution waiving sale, 773.
VOLUNTARY DISSOLUTION
Resolution calling stockholders' meeting, 774.
Publication of notice of this meeting, 775.
Resolution of stockholders to dissolve, 775.
Application to court for dissolution, 776.
Order of court for publication of notice, 777.
Publication notice of application, 778.
Decree of dissolution, 778.
Form of bonds, 781.
Form of coupons, 784.
Form of trustee's certificate, 785.
Form of registration, 785.
Form of trust deed, 780-812.
By-laws, 813-821.

FRANCHISES, PUBLIC
Franchise to exist usually inalienable, 9, 136.
Public franchises not separable from property (Const., art. 12, sec. 10), 136.
Property usually inalienable, 9, 136, 138.
But cars, trucks, etc., subject to execution, 141.
But individuals may assign to (note), 11.
Legislature can not extend, of public (Const.), 42.
Nor permit alienation so as to relieve property thereunder (Const., art. 12, sec. 10), 136.
Purchaser of property takes it with burden, 136.
But consent to acquire its public franchises is given by the state by Civil Code, sec. 361a, 136.
Sale must have consent of two-thirds of stockholders (C. C. 361a), 137, 143.
County supervisors were held to have power to give consent to sale, 138.

FRANCHISES, PUBLIC—*(Continued)*
Public franchises may be sold under execution by statute (C. C. 388), 141.
Purchaser at sale to continue exercise of franchise (C. C. 389-393), 143.
Franchise to lay pipes in city is property, and taxable, 137.
Certain are real property, 137.
Forfeiture of—suit by attorney general (C. C. 803), 510.

FRANCHISE TO EXIST
Franchise to exist, 9.
Franchise at common law inalienable, 9, 136.
Not lost, or conveyed, by sale of all its property, 138, 139.
Sale must have consent of two-thirds of the stockholders (C. C. 361a), 137.
A sale of everything but the franchise to exist does not carry with it the treasury stock, 138.
Nor its franchise to exist—the corporate life continues, 139.
Forfeiture of on suit of attorney general (C. C. 803), 510.
Probably "franchise to exist" may be sold under execution (C. C. 388), 141.
Purchaser at sale (duties), 143.
Is property, and may be taxed where property to which it is attached is located, 137.

FRANCHISE TAX LAW (NEW)
Method and rates, 672-674.
Forfeiture provisions similar to those under old "annual license tax," 674 *et seq.*

FRAUD
IN SALE OF STOCK
False representations in transactions between individuals, 330.
False prospectus or statement of assets is fraud by corporation, 332.
Where vendors own all the stock of purchasing corporation, 333.

FRAUD—*(Continued)*
As to frauds worked by blank indorsements of certificates, 339-342.
Signing fictitious name to subscription a misdemeanor (Pen. C. 557), 431.
Same of person known not to intend to take the stock, 431.
Or that terms are not to be complied with, 431.
Signing name without authority to prospectus, etc., a misdemeanor (Pen. C. 559), 432.
GENERALLY
Where same parties own all stocks, irregularities no evidence of fraud, 333.
Nor transfer of all property to a foreign corporation in order to give federal courts jurisdiction, 333, 334.

GAS AND LIGHT COMPANIES
Must now obtain franchise, 14.
But old companies need not, 14.

GIFT
Of stock in anticipation of death, 344.

GUARDIAN
Votes stock of minor (C. C. 313), 191.
May give proxy (C. C. 321b), 174.
See Executors.

HOLDING STOCK IN OTHER CORPORATIONS
Has no implied power to do so, 89.
But if its Articles contain that power it may do so, 89.
If no power, still may lawfully acquire when taken in collection of debt, 89.
No presumption that it has no such power, 89, 90.
Can not invest in its own stock except in collection of assessments, 90.
May be result of conversion, 90.
May pledge or mortgage such shares, 90.
Can not exchange its stock for stock of another (Pen. C. 560), 90, 428.

HOLDING STOCK IN OTHER CORPORATIONS—*(Continued)*
By so doing it may virtually mortgage real estate in foreign country, 91.
As to liability for debts of the other, 394.

HOLIDAYS
See Stockholders' and Directors' Meetings.

IMPLIED CONTRACTS
If contract invalid because irregular, etc., but not prohibited by law, if performed by the other party promise to pay implied, 92.
See Ratification and Estoppel, *passim*.

INCREASE OF STOCK
See Stock, same sub-title.

INJUNCTIONS
Against directors rarely issued, 216.
To suspend business granted only on notice (C. C. P. 531), 527.

INSANE PERSONS
Guardian votes stock (C. C. 313), 191.

INSOLVENCY
When does it exist? 540.
President taking deed to himself—void, 541.
Corporation may prefer creditors, 541.
Bankruptcy proceedings—must be cases not covered by United States statutes, 542.
Applies to foreign corporations in same cases, 542.
When attachment superior to title of a receiver, 543.
Where creditors fraudulently seize corporation's property—remedy, 543.
Domestic creditor's rights superior to those of foreign receiver, 544.
Assignee of corporation may sue subscribers to collect subscriptions, 544.
Trustees can be sued only on claims disallowed by them, 538.

INSPECTION
Books, etc., at office (Const., art. 12, sec. 14; C. C. 377, 378), 70, 499, 504.
By-laws open to inspection of the public (C. C. 304), 162, 164.
See Stockholder's Rights.

INVESTIGATION
State may investigate (note), 11.

LIABILITY OF STOCKHOLDERS AND DIRECTORS
See Stockholders, also Directors.

LICENSE TAX (ANNUAL)
See Franchise Tax.
Act of 1905 repealed, 651.
Some provisions of, 653-655.
New law (Act 1915) substantially same as old, 651 *et seq.*
Decision that old law was unconstitutional, 666.
United States supreme court sustains a similar law in Massachusetts, 666, 667.
Held by that court and our own court to be only an excise tax, 666, 667.
Fee for foreign corporation seventy-five dollars, 652, 654.
Failure to pay works *ipso facto* forfeiture of charter, 662, 668.
Restoration of right to do business, 662.
Applied to holding corporation also, 670.
Occupation license tax, 671.
No real distinction between foreign and domestic corporations, 669, 670.
Directors are trustees to liquidate, 671.
Recovery of money wrongfully exacted by the state on account of license tax, 671.
Social clubs not subject to this tax, but may be taxed by municipality, 672.

LIEN ON STOCK
By-law giving corporation lien is void as to innocent purchaser, 162.
May contract for lien in some cases, 318.
For assessments, 473.

LIMITATIONS, STATUTE OF
See various acts, and Officers and Liabilities.

MAJORITY
Generally rules, 168, 222, 223.
May make call to remove directors (C. C. 310), 235.
Distinction between "majority of the shareholders" and "the holders of the majority of stock," 236.

MANAGERS
Managers(?) to be elected at stockholders' meeting (Const., art. 12, sec. 12), 167.
Compensation of, 159.
General manager, even if *de facto*, may make contracts, etc., 287.
By-law provisions concerning, 287.
When liable for defalcations, 418.
Under authority "to handle business in all its details," 262.
Where a general authority is given may sign protest as to "street work," 281.

MANDAMUS
Title to office not tried by, 204.
Proper to compel officer to perform duty, 204, 205.
But not to enforce private rights, 249.
Even as to foreign corporation, 204, 680.
To call meetings, 232.

MARGIN—SALES OF STOCKS
Sales of stocks on margin under old and new law, 354.

MARRIED WOMEN
May transfer and receive dividends same as *femme sole* (C. C. 325), 346.

MEETINGS
See Directors' Meetings; Elections; Stockholders' Meetings; Voting.

MINING CORPORATIONS
May consolidate (C. C. 587a), 133, 681.
Reports, etc., 679.

MINING CORPORATIONS—*(Continued)*
Dividends proper though produced by exhaustion of its property, 434, 440.
The doctrine in the "South Mountain case," that mining corporations are different from others, doubted, 497.
Penalties on president for refusing inspection of mine, 680; (C. C. 590), 685.
Penalties on directors for failing to post balance sheet, 680; (C. C. 590), 685.
Penalties on superintendent, 680; (C. C. 590), 685.
Foreign corporations must allow inspection, 680.
Transfer agencies (C. C. 586), 681.
Transfer agencies, stock issued at (C. C. 587), 681.
Books to be kept (C. C. 588), 683.
To post balance sheet, 683.
Superintendent's monthly report, 683.
Stockholder may inspect mine (C. C. 589), 684.
Liability of officers refusing right to inspect, 685.

MINORS
Guardian may vote shares (C. C. 313), 191.

MISNOMER
See Pleadings.
Does not invalidate instrument (C. C. 357), 144.

MORTGAGES
See Conveyances.
Of growing crops, and income, 537.
Of stocks owned by it, 90.
Authorized only by preliminary meeting of stockholders invalid, 208.
If terms go beyond resolution, effect of, 127.
Declaring whole debt due on interest default, 127.
Discussion of this subject, 127-131.
In foreclosure selling property as a whole, 131.
Trustee in trust deed represents all bondholders, 132.
Receiver's certificates, 132.
Special meeting, without notice, can not order mortgage, 233.

NAME
Articles must state (C. C. 290), 19, 23.
Ordinary must not contain the words "trust" or "trustee," 46, 47.
No statute requiring it to contain the words "company," etc., 23.
But it must not resemble closely the name of another (C. C. 296), 19, 23, 25-27.
Must not contain word "bank" if not so organized, 23.
Changing, same method as for natural persons (C. C. P. 1275-1279), 23, 545.
Done by superior court only, 545, 546, 457.
Two cases only reported, 547, 548.
Copy of decree changing to be filed where (C. C. 300a), 24.
Can not be done by amending Articles (C. C. 362), 24, 38, 545.
Resemblance of names, 25-27.
Word "company" in name raises no presumption of incorporation, 27.
But "Inc." after name indicates a corporation, 27.
If sued under wrong name, 572, 581.
If name changed—suit, 581.

NEWSPAPERS FOR NOTICES
By-laws may designate (C. C. 303), 152, 161.

NOTICE
Knowledge of stockholder is not notice to the corporation, 586.
Nor of a single director when not acquired officially, 586.
But of officials is, 586.
Instances, 586 *et seq.*
Corporation can not deny knowledge of facts presumptively within its knowledge, 588.
Corporation held to have notice of the contents of its own books, 588.

NOTICES
See Directors' Meetings; Stockholders' Meetings; Newspapers.

OFFICE
Must maintain office and principal place of business (Const., art. 12, sec. 14; C. C. 290), 19, 27, 28, 70.
Definition of, 28.
If Articles not filed in that county no *de jure* existence, 27.
Articles stating in San Francisco held sufficient, 28.
But in Calaveras County not, 28.
Is where books are kept and officers meet, 28.
Scene of operations may be elsewhere, 28, 29.
May be changed, and method (C. C. 321a), 45.
Consent of two-thirds of stockholders necessary except to change from one place in a city to another in the same city (C. C. 321a), 45.
Notice of intended change to be published (C. C. 321a), 45.
Certificate of change to be filed (C. C. 321a), 45.
Directors must meet at, 198.
Strange definition of under insolvent law, 542.

OFFICERS
Corporation bound by their acts, 78.
As to compensation of officers, 157-161.
Removal of (C. C. 315), 199.
De facto, acts of valid, 219.
Can not be appointed in Articles, 220.
Elected by directors (C. C. 308), 219.
President must be director (C. C. 308), 219.
Vice president—unprovided for, 72, 161.
Secretary and treasurer need not be directors, 219, 220.
Duties of by law (C. C. 308), 219, 221.
Meaning of term "officer" uncertain, 160.
Agreement that person shall be elected president can not be enforced, 202, 296.
Quo warranto to try title to office—ordinarily not *mandamus*, 204.
Mandamus as to foreign corporations, 205.
Certain holding over, not *de facto*, 205.
Purchasing property from the corporation, 275.
Selling property to the corporation, 276.
Purchasing claims against the corporation, 274.
Purchasing property for corporation—secret profits, 276.

OFFICERS—*(Continued)*
Officers and agents, statutes and by-laws govern appointment and powers, 288.
Loans by officers to corporation, 268.
Appointment may be inferred, 289, 290.
Acts *in delicto*, corporation responsible for, 290.
Out of ordinary course no presumption of authority, 290.
Authority under by-laws, 277, 285.
Ratification, 277, 292.
Responsible for funds embezzled, 291.
Selling property at inadequate price, 292.
Appointing subordinates and salaries, 292.
Agents may be removed, 236, 292.
Directors may be removed by stockholders or court, 293.
Liability on corporation notes, 293-295.
Attorney's fees contracts, 265, 295.
Authority of, to sell real estate must be by resolution, 296, 297.
No executive committee under laws, 297.
Are charged with notice of the usages and customs of the corporation—compensation cases, 299.
Issuing untrue or exaggerated report or prospectus, officer is guilty of felony (Stats. 1905, p. 786), 420.
Same (C. C. 316), liable; (Pen. C. 564) felony, 419.
A case of bank directors, 419.
Misleading advertisements or circulars (Stats. 1909, p. 1078), 421.
Errors of opinions or mutual mistake, 422.
Of savings bank overdrawing his account—a misdemeanor (Pen. C. 561), 425.
Receiving deposits when bank insolvent (Pen. C. 562), 425.
Wrongfully securing property of corporation (Pen. C. 563), 425.
Falsifying or destroying books of corporation (Pen. C. 563), 426.
Embezzlement defined (Pen. C. 504 and 506), 428, 429, 430, 431.

OFFICERS—*(Continued)*
Signing fictitious name to subscription for stock (Pen. C. 557, 558, 559), 431, 432.
Exhibiting false paper or making false certificate to public officer, 431, 432.

ORGANIZATION
How organized (C. C. 358), 95.
Must organize within one year (C. C. 358), 61, 62, 63.
Ceasing to do business for two years (C. C. 358), 61.
Or disposing of all its property (C. C. 358), 61.
And neglecting to elect officers (C. C. 358), 61.
Resumption of business restores (C. C. 358), 61.
Failure of directors named in Articles to meet or act, there is no organization, 95.
Can not be assailed, even by state, after ten years doing business (C. C. 358), 61.
See Collateral Attack; Forfeiture, 61.
An abortive attempt results in *de facto* corporation, 65.
Errors in organization—a *de facto* corporation, 21, 22.
At organization all the stock may be issued to organizers for property, 255.
As to creditors, is such stock full paid? 256.
Note and mortgage on authority of meeting preliminary to organization not valid, 264.

PENAL CODE
For copies of sections, and citations, see index preceding this one.

PENALTIES
See Fines and Penalties.

PARTNERSHIP
Surviving partner may vote shares, 191.
Power to enter into, 74.
Corporations to liquidate partnership, 441.

PLEADING
Allegation that party is a corporation is indispensable, 59, 581.
Changed name and wrong name—suits, 581.

PLEADING—*(Continued)*
Corporate existence to be averred in each count, 581.
Sued by corporate name admits existence, 581, 582.
Name in contract admits existence, 582.
Existence of corporation may be denied, 582.
Proof of *de facto* existence sufficient, 582.
Alleging charter forfeited—must prove, 582.
Meeting and election of officers need not be proved, 60.
If fails to state secretary certified, assessment notice, objection must be made, 480.
All facts making assessment invalid must be fully set out, 494.
If contract properly signed want of authority must be proved, 582.
Allegation of execution proved by proof of ratification, 583.
Failure to allege existence, and alleging no capacity to sue, 583.
Denial of corporate existence raised only by plea in abatement, 583.
Denial of corporate existence does not raise question of filing Articles in county, 583.
Assignee suing not necessary to allege corporate existence of payee, 583.
Assignment and letter support finding, 583.
Corporation can not deny certain matters on information and belief, 584, 783.
Nor by defendant that foreign corporation has appointed agent, 584.
Corporation can not deny in a pleading what is presumptively within its knowledge, 584, 588.
Verification made by certain officers, 584.
Verification by payee of assigned note, 584.
Verification by attorney, *quære?* 585.
Affidavit for attachment, 585.
Not necessary, ordinarily, to allege in what state corporation is incorporated, 614.
Foreign corporation not required to allege and prove that it has filed Articles—burden of proving contrary is on other party, 634.

PLEDGE
Corporation may pledge its bonds, 111.
Corporation may pledge other stocks owned by it, 90.
And possibly can pledge its stock for cash to be advanced, 101, 114.
But treasury stock can not be pledged to secure debts of corporation, 101, 114.
If stock pledged is transferred on books, as to third parties, pledgee is owner, 328.
May be pledged without indorsement of certificate, 327.
Broker pledging stock pledged to him conveys full title, 328.
Stolen certificate, indorsed in blank, purchaser gets no title, 328, 339.
Not entitled to return of same certificate, or the identical shares, 328.
Delivery of certificate, though unindorsed, good between parties, 327, 329.
Sale of note carries pledged stock, 329.
Pledgor secretly acquiring title to pledged stock, 329.
To escape stockholder's liability, books must show pledge, 329, 330.
Pledgee must account for dividends, 330.
Purchaser at execution sale without notice of pledge gets a good title, 334.
Pledge by bailee of stock good, 338.

PLEDGOR AND PLEDGEE
See Pledge.
Pledgor usually votes stock (C. C. 313), 191.
But if pledgee fails to vote, pledgor may do so if not otherwise agreed (C. C. 313), 191.
Pledgee of treasury stock, nor any other person can vote (note), 190.
Pledging treasury stock, 101, 114.
Purchaser at execution sale gets good title, 324.
Pledgee can not enjoin sale on execution against pledgor, 338.
But after levy of attachment or execution pledgee may, notwithstanding, demand transfer of stock to him, 577.

PLEDGOR AND PLEDGEE—*(Continued)*
Duty of pledgee to cause proper entry on the transfer books, 335.
Sale by broker conveys good title, 328, 335, 336.
Delivery of certificate to pledgee and immediate redelivery back, no pledge as to corporation even with knowledge, 343.
Pledgee entitled to the dividends, 439.

POLITICAL CODE
For copies of sections, and citations, see index preceding this one.

POOLING AGREEMENTS
Valid—discussion, 179-182.

POWERS
See Corporations under this sub-title.

PREFERRED STOCK
May be created (C. C. 290), 20, 31.
As to voting no greater or less rights than common (C. C. 290), 20, 31.
Equally liable, holders of, for debts of corporation (C. C. 290), 20, 31.
Probably can be made non-assessable, 32.
Certificate must show number of shares of each class authorized (C. C. 323), 300.
Also nature and extent of preference, 300.

PRESIDENT
Compensation or salary, 159.
Vice president unprovided for, 72, 161.
Once said to have no greater power than a director, 261.
By-laws or custom may enlarge power, 261 *et seq.*
Must furnish financial statement at election meeting (C. C. 302a), 197.
Adding word "president" to signature, 262.
Executing note to himself, 263.
Certain instruments to be under seal, 263.
Employing counsel and physicians, 265.
Effect of certain by-law, 266.

PRESIDENT—*(Continued)*
If benefited by contract, 266.
Generally not absolutely void, 215, 266.
Can not vote on contract in which he is interested, 267.
Can not secure his own claim if corporation insolvent, 267, 600.
Can not make secret profits, 267.
Especially in selling its stock, 267.
Loans by him to corporation, 268.
Discounting corporation's notes, 271.
Purchasing claims against corporation, 274.
Secret purchase of property, 275.
Selling property to corporation, 276.
Signing contract concerning real estate, 277.
A deed to himself, authorized by directors not void, 277.
Ratification of acts, 277.
Corporation presumed to have knowledge of all facts known to him, 280.
His own vote excluded on ratification where he is interested, 280.
Where directors have given him general authority, 261 *et seq.*
Signature of secretary to notes may not be necessary, 266, 282.
Is liable to corporation if he exceeds powers, 282.
Entry of president's action on books not notice as between him and corporation, 282.
Effect of resolution to make "all necessary arrangements," 282.
As to dealing in real estate, 283.
May sign protest as to "street work," 283.
A verbal agreement among stockholders to elect a party president can not be enforced, 202, 284, 296.
Compensation, 157 *et seq.*
See Officers.

PRINCIPAL PLACE OF BUSINESS
See Office.

PRIVATE CORPORATIONS
What are, 14.

PRIVILEGES
Origin of, 3 *et seq.*
No special to be given, 10.

PROMOTERS
Are agents of subscribers until corporation formed, 245, 589, 590.
Afterwards of corporation, 245.
Or may be ignored, 245.
Contract as to secretary of corporation to be formed void, 202, 284, 296.
Can not be defined—but described, 589.
Can not sell property on which he has an option only to corporation he is promoting, reserving secret profits, 590 *et seq.*
But if he owned it before hand he may do so, nor can he conceal fact that he owns it, or make false statements as to its cost, 590.
He can not receive commissions or bonus from the vendor, 590.
English rule, 591.
Some typical California cases, 591 *et seq.*
Promoters are not the corporation, 604.
Promoter's contracts not the contracts of the corporation, 604.
Assignments of promoter's contracts, 604.

PROXIES
By-law restricting to stockholders void, 150, 188, 189.
By-law may regulate forms, filing and other formalities, but not power (C. C. 303 and 321b), 151, 152, 154, 155.
May vote on all questions, 155.
Query: as to signing "consents," 155.
Must be present at meeting (C. C. 321b), 173.
Must be in writing, 174.
By stockholder or authorized attorney, 174.
Not valid after eleven months unless longer time specified, 174.

PROXIES—*(Continued)*
Not to exceed seven years, 174.
Revocable at any time (C. C. 321b), 174, 189.
Executors, administrators, guardians and trustees may give, 174, 189.
Proxy can not ordinarily appoint proxy, 175, 190.
Presence of stockholder in meeting supersedes proxy, 175.
Proxy to two persons must be voted by both jointly unless it is to "or either of them," 175.
Executors may give proxies, 174.
Must be filed with corporation, 189.
May be limited in power, 190.
Proxy may be given by married woman (C. C. 325), 346.
On *viva voce* vote counts only one no matter how many he represents, 189.
When limited to a special matter, 190.
With an interest may not be revocable, 202.

PUBLIC CORPORATIONS
What are, 16.
Cities, towns and school districts are, 16.
A county is not, 16.
Reclamation and levee districts are not, but are public agencies, 16, 17.
So is an agricultural society, 16.
Sanitary districts are public, 16.
Irrigation districts are public in part and private in part, 16.
Quasi public are gas, water, electric light and street railroads, 16.
All other corporations are private, 16, 17.

PUBLIC POLICY
Observation on, 180.

PUBLIC SERVICE CORPORATIONS
Regulation—state may regulate, 13.
Use streets—once right acquired may occupy new streets, 14.

PURPOSES
May be organized for any purpose for which individuals may associate themselves, 15, 16, 17, 72 *et seq.*

QUORUM
Of stockholders' meetings majority of subscribed stock (C. C. 312), 182.
Less than quorum may adjourn, 182.
Of directors, a majority (C. C. 305), 206; (C. C. 308), 219, 221.
If quorum not present and acting (voting) no business can be done, or act performed, valid against the corporation—can not even adjourn (C. C. 305), 206, 211.
Director having interest not counted for quorum, 212, 223.
Majority of quorum usually sufficient, 221.

QUO WARRANTO
See Dissolution of Corporations.
For forfeiture of charter, 63.
Proper method of trying title to office, 204.
Only proper method to test right to exist, 69.

RATIFICATION
Corporations stand on same footing as natural persons, 77.
Early decision by Field, J., 92.
Can not retain fruits and repudiate contract or obligation as *ultra vires*, 92.
See subject, *Ultra Vires*, 92 *et seq.*
By directors to be in same manner as original act should have been, 209.
Distinct from estoppel *in pais*, 209.
Directors can not ratify note given by officers, corporation owing no debt, 209.
Nor can stockholders ratify what stockholders could not do, 207.
Stockholders said not to be estopped by any act of their own, 207.
If act contrary to law can not be ratified, 214.
By quorum of directors of acts of a board of less than a quorum, 222.
By entering transaction in books, 270.
Of president's acts, 277.
Of pledge made instead of sale, 278.
Written contract; sometimes ratification need not be in writing, 279.

RATIFICATION—*(Continued)*
Ratification of sundry acts (note), 279.
Of employment of attorneys by president (also note), 280.
Of president's acts—president can not vote on, 281.
Applies only as to third persons—not usually to officers, 282.
Of acts of manager, knowledge of alone, sufficient, 287.
Of sale of real estate—a peculiar case, 296, 297.
Of execution of note, if proceeds retained, 297.
Of improper transfer, 342.
Of mortgage of mining ground—when insufficient, 126.

REAL ESTATE
Can hold none longer than five years except what is actually necessary (Const., art. 12, sec. 9), 84.
If done, however, land does not escheat, 84.
No penalty for so doing, 84.
State only can raise objection, 85.
Same prohibition in Civil Code, sec. 360, 85.
By unanimous vote of directors may acquire title to property in which its business is conducted (C. C. 360), 85.
May acquire title by prescription, 86.
Can not acquire under a will, 86.
But can not own forbidden real estate indirectly through individuals, 86.
Can not hold as joint tenant, but may as a tenant in common, 86.
If organized to deal in land its power to hold land is unlimited, 87.
If corporation not yet in existence deed may or may not be void, 87.
Have full power of disposition, 87, 88.
A misnomer in deed not fatal, 88.
Officers no power of disposition; directors only, 88.
But to convey all of its property, business and franchise consent of two-thirds of the stock necessary, 88, 89, 102.
The president may assign a mortgage, 89.
Specific performance of contract concerning, 210, 211.
Sale of requires resolution of directors, 210.

REAL ESTATE—*(Continued)*
Under a rule requiring the consent of two-thirds of the stockholders, stockholders only can object; outsiders can not, 87, 88.
This consent need not be attached to the mortgage, 126.

RECEIVER
Will not be appointed in suit by attorney general to dissolve or on dissolution, 512, 518.
Equity has no power to appoint, 530.
Policy of our law, 528 *et seq.*
When is corporation insolvent? 540.
To be sued in court appointing him, 544.
Notice must ordinarily be given of application (C. C. 531), 527.
Grounds for appointment generally—statutes (C. C. P. 564), 527.
Discussion of subject, 528 *et seq.*
Upon dissolution—statute (C. C. P. 565), 527, 528.
Unless others appointed, trustees close up affairs (C. C. 400), 527, 538.
May be appointed on removal of directors, 536.
"Other grounds" for, 536.
For specific property—grounds for are the same as in case of natural persons, 537.
May be appointed by judge at chambers, 537.
Of growing crops, 537, 538.
Directors winding up, when can be sued, 538.
Appeal now remedy instead of prohibition to determine power of appointment, 539.
Receiver's certificates, 132.

RECORDS
Corporation must keep records of all business transactions.
Journal of all directors' meetings.
Journal of all stockholders' meetings.
With time and place of same.
Whether regular or special.
If special, how authorized.
If special, its object.

RECORDS—*(Continued)*
If special, how notice given.
Record must show—
Every act done or ordered.
Who were present.
Who were absent.
If requested, time of entering and leaving meeting.
Ayes and noes.
Protest to be entered in full.
Inspection, all are open to—
Every person interested.
Any director.
Any stockholder.
Any creditor (Const., art. 12, sec. 14; C. C. 377), 70, 499.
"Stock and transfer book" must show—
Record of all stock.
Names of all stockholders, alphabetically.
Installments paid or unpaid.
Assessments levied, paid and unpaid.
Sale and transfer.
By whom and to whom and date.
Open to inspection, of same parties (C. C. 378), 504, 506.
No duty of stockholder to have his name entered on books, 300, 301, 500.
Transactions provable by parol evidence, 499, 500.
Rough memorandum of proceedings of meeting are secondary evidence only, 499, 500.
Record may be controverted by oral testimony, 501.
Record is only *prima facie* evidence, 501.
Inspection—right given without regard to motives, 501.
Right enforced by *mandamus*, 501.
But a creditor of a stockholder has no rights of inspection, 502.
Right to compel production of books in court—see note on, 502.
Benevolent association may limit right of inspection, 502.
Refusal to allow inspection, losing business, no ground for dissolution, 502.

RECORDS—*(Continued)*
Penalty for refusal of inspection (Pen. C. 565), 503.
Books of banks—what ones to be kept open to inspection (C. C. 321), 503.
Keeping these books evidence itself that corporation commenced business, 504.
As to third parties—sometimes evidence, 504.
Falsifying is a crime, 504.
As to "stub-book," stock ledger and journal as records, 505.
Subscription book not indispensable, 505.
Stub-book not evidence of all subscriptions, 505.
"Stock and transfer book" not a public record, and no representation to world of who are stockholders, 506.
This book is conclusive evidence of right to vote, 183, 506.
Inspection of, 504, 506.
If none exists—oral evidence, 506.
Lost records—restoration, 506.

REGULATION
State may change laws, 10, 11.
May regulate rates of public service corporations, 13.

REMOVAL OF DIRECTORS
May be by vote of two-thirds of stock (C. C. 310), 235.
Must be at general meeting, 235.
On notice of purpose of meeting, 235.
On call by president, 235.
Or by majority of directors, 235.
Or by majority of stockholders, 235.
Call in writing to secretary, 235.
Who gives notice of time, place, object and by whose order, 235.
If secretary refuses, 235.
Notice as in Civil Code, sec. 301, etc., 235.
If removed, meeting elects new board, 235.

REPURCHASE OF STOCK
Repurchase of stock by corporation, 444.
Repurchase of stock by individual—agreement for, 445.

RESCINDING
For false representations in sale between individuals, 330 *et seq.*
For false representations in sale made by corporation, 332 *et seq.*

RESIDENCE
At principal place of business, 27.
Under old law had none, 28, 558.
Foreign corporation can have no residence in this state, 523, 560, 568.

RESIGNATIONS
To take effect on acceptance, 216.

SALARIES
Director entitled to none, 157.
Officers; void vote—*quantum meruit*, 157-161, 214.
No presumption new secretary same as old, 286.
On agreement to purchase stock, 287.

SEAL
Right to adopt a seal, 72, 80.
Any seal habitually used becomes the corporate seal, 80, 81.
The old doctrine of necessity of seal is abandoned in many kinds of cases, 80-84.
May adopt a private seal, 82.
The seal affixed is *prima facie* evidence of authority to affix same, 83, 263-266.
If seal attached burden of proof is on person denying authority, etc., 84.
And that it is the act of the corporation, 84.
Ordinary everyday matters do not require a seal, 83, 84, 263-266.
Now generally unnecessary, 264.

SECRETARY
Must furnish financial statement at annual meeting (C. C. 302a), 197.
Under certain by-law need not sign notes, 266, 282.
Promoter's contract as to secretary void, 284.
Secretary failing to call meeting court may do so, 178, 284.

SECRETARY—*(Continued)*
Executing documents, making affidavits, etc., 284.
No authority usually to make contracts, 284.
Where really conducting whole business, 286.
Salary on condition of buying stock, 287.
Salary—no presumption that new secretary is to have same as old, 286.
Ratification of acts, see Ratification, of president's acts.
See Officers.

SELLING OUT TO ANOTHER CORPORATION
Purchasing corporation takes property of the other subject to all of its debts, 134.
But no novation without consent of creditors, 135.
Selling property—stockholders can not, 224.
Directors must so resolve, 224.

SELLING PROPERTY, FRANCHISE, ETC.
A sale of the business, franchise and property as a whole, requires consent of two-thirds of the stock (C. C. 361a), 131, 137.
Power of directors to sell less than the whole of these is not limited by this section, 139.
A sale of everything but franchise to exist does not carry treasury stock, 138.
Objection may be raised by any one interested, 139.
Disability arises as to sale of all three at once, 139.
Directors may sell all of the property without prior consent of stockholders, 139, 140.

SPECIFIC PERFORMANCE TO SELL
May be granted, 318.
Conversion by corporation, 316.
Part performance as ground, 210, 211.

STATUTES—ACTS OF LEGISLATURE
For copies of sections, and citations, see index preceding this one.

STOCK
Common and preferred (C. C. 290), 20, 305.
If no preferred, all shares of equal right (C. C. 290), 20, 22, 305.

STOCK—*(Continued)*
Common and preferred shares to be of same par value (C. C. 290), 20, 31.
Certificates what shall contain (C. C. 323), 305.
Preferred may be created by amendment diminishing common, 40, 125.
Shall state nature and extent of preference, 305 and (C. C. 323) 300.
Certificate transferred by indorsement (C. C. 324), 306, 311, 321, 322, 323.
Transfer not valid until entered on books (C. C. 324), 306.
Transfer of water company stocks (C. C. 324), 306.
Shares held by foreign executor—power to sell, 310, 311.
Right of transfer, 313.
Corporation must make transfer, 313.
Is personal property (C. C. 324), 306, 307.
Treasury stock can not vote, 194.
Specific performance of contract to sell may be enforced, 318.
Corporation may have lien on, 301, 318.
Situs of stock, 308-312.
Penalty for refusing to transfer on books (C. C. 324), 307.
Non-negotiable, 303, 319.
Gift of in anticipation of death, 344.
In water companies appurtenant to land, 345.
Subscriptions for stock a "trust fund," 386.
Sale of stocks on margin, 354.
Stockholders' statutory liability the same on common and preferred (C. C. 290), 19, 414.
Capital stock defined, 434.
Corporation has no lien on for the unpaid purchase price, 301, 318, 474.
Can not be without value for it makes holder a stockholder, 487.

CERTIFICATES OF STOCK
See also above subdivision.
Must be issued when paid up (C. C. 323), 300.
To be signed by president and secretary (C. C. 323), 300.

STOCK—*(Continued)*

If partially paid may issue if by-laws so provided (C. C. 323), 300.

But must show amount paid on it, 304 and (C. C. 323), 300.

If different classes must show their class upon face (C. C. 323), 300.

And number of shares of each authorized (C. C. 323), 300.

And nature and extent of preference (C. C. 323), 300.

Actual issuance not necessary to constitute one a stockholder, 299.

Cancellation of erroneous certificate, 301.

Corporation not having possession of it can have no lien on it for unpaid balances, 301, 318, 474.

Informality does not make invalid, 301.

A lien upon it may be created by contract, inserted in certificate, 302, 318.

Certificate must be issued if full paid, 302.

Signed by *de facto* officer, valid, 302.

Limitation on objections of stockholders to an issue is three years, 302.

Limitation on right to demand certificate four years, 302.

Certificates are not negotiable paper, 303, 319.

Situs of stock office of company, 308-312.

Distinction between stock and certificates, 308 *et seq.*

Indorsement and delivery sufficient between the parties, 321.

As to all others must be entered on books (C. C. 324), 306, 321.

Possession of an unindorsed certificate no evidence of title, 325.

Transfer without indorsement, 327.

Stolen certificate, though indorsed in blank—purchaser gets no title, 339.

Lost or stolen, rights of subsequent holder, 328, 339.

Lost or wrongfully withheld, suit for (C. C. 328), 348.

Ratification of improper transfer, 342.

STOCK—*(Continued)*

Word "trustee" without significance, 336, 339.

Transfer by non-resident affidavit and bond may be required (C. C. 326), 347.

Pledgee can not demand return of identical certificate, 328.

Certificate in safe deposit company at time of death of owner, 352.

TRANSFER OF STOCK

Until transfer is made on the books, the purchaser has no rights except the right to have it transferred, 186, 276.

By indorsement by signature of owner, his agent, attorney or legal representative and delivery of the certificate (C. C. 324), 306, 311, 321, 322, 323.

But not valid as to third parties until entered upon the books (C. C. 324), 306.

Water company stock transferred only with the land watered, 306.

Penalty on officer refusing to make transfer, 307.

Distinction between stock and certificates, 308-312.

Corporation must make transfer, 313.

Identity of shares remains, 315, 321.

Holder's right to transfer can not be abridged, 313, 325.

Mandamus not available to compel transfer, 313, 315.

Suit in equity method to compel corporation to make transfer, 313.

Damages for refusal to transfer, 315.

After charter expires—*quære*, 313.

Corporation may interplead claimants, 316.

Same rule as to foreign corporation, 314.

No conversion by corporation in such a case, 314, 315.

Refusal of corporation need not be wilful to give cause of action, 314.

The officer, so refusing, acts at his peril, 314.

Motives can not be inquired into by officers, 314.

Right to not defeated by unpaid assessment, 315.

Refusal by corporation, a conversion, 316.

Conversion by corporation, 316.

STOCK—*(Continued)*
Measure of damages for, 317.
Equity will compel wrongful transferee to return, 316.
Lien on by corporation, 301, 318.
Are non-negotiable, 303, 319.
But as to others transfer must be on books, 323.
Manner of transfer, 323.
So also, to give the right to vote, 323.
Possession of unindorsed certificate no evidence of ownership, 325.
Validity of transfer governed by the law of the place of incorporation, 326.
Transfer without indorsement good between the parties, 327, 329.
If not made on books vendor must pay assessment (see Assessments), 324.
By foreign executor, 310.
As to foreign corporation, 310.
May require proof of signatures, etc., 324.
Corporation bound to know authority and power of agent or attorney to transfer, 326.
Special cases of powers of attorney, 326.
Pledgee should have transfer made, 335, 336.
Trustee transferring—duty of corporation, 334, 335.
Law where corporation is created governs validity of transfer, 326.
Delivery without indorsement is good between the parties, 327.
Until sale under attachment or execution owner can transfer, 337.
Delivery and re-delivery back, no transfer, 343.
Must be made with the knowledge of the transferee, 343.
Tracing shares by the stock books, 343.
Ratification of improper transfer, 342.
Married woman may transfer same as a *femme sole* (C. C. 325), 346.
By non-residents, proof that transferee is living or bond may be required (C. C. 326), 347.

STOCK—*(Continued)*
Records of—transfer book (C. C. 378), 504.
Inspection of (C. C. 378), 504.
Suit against corporation for duplicate of lost or wrongfully withheld certificate (C. C. 328), 348.
If in safe deposit box—owner deceased—inheritance tax, 352.
If charter forfeited under old "license" law corporation could not thereafter transfer stock, 666.
Gift in anticipation of death, 344.
Transfer agencies of mining companies (C. C. 586), 681.
Transfer agencies stock issued at (C. C. 587), 681.
FICTITIOUS STOCK AND BONDS
Are void (C. C. 359 and Const., art. 12, sec. 11), 106.
This clause of the constitution is self-executing, 108.
If any value given, not fictitious as to corporation or stockholders, 109.
But different rule as to creditors, 109.
Stock issued for note not fictitious, later doubt expressed, 110.
Note not void but misdemeanor to take, 110.
But note containing conditions makes stock void, 110.
Issued for stock of another (see case), 111.
Sold below par or issued as "bonus" good as to corporation and stockholders, 112, 113, 255.
But not as to creditors, 112, 113, 256.
Issued without consideration void and not subject to assessment, 113.
Issued to a person to sell, void, except as to innocent purchasers from him, 114.
This section of constitution applies to street railroads notwithstanding other sections of code, 114.
Whether treasury stock may be pledged by corporation uncertain, 101, 114.
Bonds may be sold at a discount, 115.
At organization all stock may be issued to organizers for property, 255.
As to creditors, is such stock full paid, 256.
Discordant decisions, 115.

STOCK—*(Continued)*

STOCKS BOUGHT ON MARGIN

General subject, 354 *et seq.*

SUBSCRIPTIONS FOR STOCK

Prior to organization good, 34, 35, 238, 245.

But not if purposes different, 241.

But sufficient to qualify director, 34.

If in favor of promoter corporation may collect, 238, 245.

Can not be rescinded, or cancelled by the corporation, ordinarily, 241, 242.

Subscriptions may be released, 241, 242.

Conditional subscription not binding until condition fulfilled, 240, 242.

Secret conditions void, 240.

Can not be diverted to another corporation, 241.

Rescinding, 242.

Over-subscriptions, 244.

Representations in procuring, 243, 246.

Agreement to repurchase, 243, 247, 444.

Not necessary to be named in Articles, 238.

Statute part of contract, 238.

No duty until call made, 239.

Statute of limitation begins to run at call, 239.

Agreement to subscribe does not make him a member, 239.

Those present at organization not agents of those absent, 239.

Attachment against subscribers' property, 239.

Subscriber may fix terms of payment—if accepted, 240.

Right of stockholder to subscribe to new issues undetermined, 248.

May be paid by a promissory note, 110.

But can not be made payable only out of dividends, 110.

Conditional note given for, 286.

Liability on distinguished from statutory, 386-390, 460.

STOCK—*(Continued)*
Subscriptions a "trust fund," 386, 387, 388.
Payment of corporation debt does not satisfy, 393.
Creditor's bills to enforce, 391.
Creditor of corporation may attach, 498.
Creditor's bill—no prior call necessary, 393.
Unpaid—as between each other, 394.
Stockholder's liability does not diminish subscription liability, 390.
Corporation insolvent, assessment is collectable by suit only, 395, 497.
In case of over-valued property taken in payment of subscriptions, 395.
Giving stock away—effect of, 370, 399.
Subscription book not necessary, 505.
Subscription contract may vary liability to assessments, 468.
But not as to creditors (see Liability), 469.
Subscription in irregular form, 469.
To subscribe fictitious name is a misdemeanor (P. C. 557), 431.
Or name of person not intending to take stock, 431.
Or terms not to be complied with, 431.

DECREASE OF STOCK
Can not be done by amending Articles (C. C. 362), 38.
May be diminished by vote of two-thirds of *subscribed or issued* stock (C. C. 359), 118.
Meeting to be called and notice thereof published and contents thereof, 118.
Notice must also be sent by mail to each stockholder (C. C. 359, subdiv. 4), 118.
If two or more kinds of stock exist there are special requirements, 118.
Can not be diminished below the indebtedness of the corporation (C. C. 359), 118.
In lieu of stockholders' meeting, may be done by unanimous vote of directors and with assent of two-thirds of the stock (C. C. 359, subdiv. 5), 118.
But copy of resolution must be sent stockholders, 118.
Certificate of (C. C. 359, subdivs. 7 and 8), 119.

STOCK—*(Continued)*

Conversion by corporation actually results in decrease, 90, 451.

But court held otherwise, 90, 126, 451.

Repurchase by agreement by corporation, 444.

Certificate of decrease must be sworn to by president and secretary (C. C. 359, subdiv. 8), 120.

Certificate of, where to be filed (C. C. 359, subdivs. 7 and 8), 119.

Certificate of conclusive proof, 120.

Notices to be published in papers provided by by-laws, 121.

Dividing stock into common and preferred not a decrease, 125.

Nor is the conversion of stock by refusing to transfer, 126.

But corporation purchasing its own stock (except on assessment sales) is a reduction of capital stock, 126.

INCREASE OF STOCK

Can not be done by amending Articles (C. C. 362), 38.

Stock can not be increased without consent of majority of shares, on sixty days' public notice (Const., art. 12, sec. 11), 106.

This clause of constitution is not self-executing, except as to notice, 108.

May be increased or diminished at stockholders' meeting by a two-thirds vote of *"subscribed or issued"* stock (C. C. 359), 116.

Meeting therefor to be called and notice thereof published and contents thereof, 116.

Notice must also be sent by mail to each stockholder (C. C. 359, subdiv. 4), 117.

If two or more kinds of stock exist, special requirements (C. C. 359), 116.

Increase can be made only at stockholders' meeting (written consent not sufficient) (C. C. 359, subdiv. 5), 118, 122.

Certificate of to be made by the president and secretary (C. C. 359, subdivs. 7 and 8), 119.

STOCK—*(Continued)*
Should be acknowledged by officers and directors as proof of signatures, but it is not required.
But must be sworn to by president and secretary (C. C. 359, subdiv. 8), 120.
Certificate of, where to be filed (C. C. 359, subdivs. 7 and 8), 119, 120.
Certificate of conclusive proof, 120.
Notices to be published in papers provided in by-laws, 121.
Dividing stock into common and preferred not an increase, 125.
False certificate concerning, a felony (Pen. C. 558), 432.

STOCK IN OTHER CORPORATIONS
See Holding Stock in Other Corporations.

STOCKHOLDERS
No fiduciary relation with each other, 248.
No power to ratify acts directors could not do, 210.
Can not hire employees, 210.
Have no title to corporation property, 248.
Right to participate in new issues undetermined, 248, 249.
Equity will protect rights of, 249.
Mandamus not proper proceeding to secure ordinary private rights, 249.
Mandamus may issue to enforce water rights, 249.
May exchange property for stock, 107-114, 255.
One person owning all the stock, status of, 207.
Two corporations having same stockholders are not identical, 216.
Stockholder as creditor gaining an advantage, 267.
Definition of in Civil Code, sec. 322, not a definition for all cases, 368.
Who are stockholders, 184, 368.
Can not abstain from inquiring into corporation affairs and still be protected, 450.
No duty on stockholder to see that his name is entered on stock books, 300, 500.
A stockholder is not an agent of the corporation, 586, 604.

STOCKHOLDER'S LIABILITY
Liable for proportion of all debts contracted while he was a stockholder (Const., art. 12, sec. 3; C. C. 322), 359.
Any creditor may bring joint or several actions for recovery thereof (C. C. 322), 360, 368.
Liability contractual as to allegation only, 366.
A several judgment against each (C. C. 322), 360.
Stockholder paying his proportion (C. C. 322), 360.
Subsequent transfer does not relieve stockholder (C. C. 322), 360.
Transfer must be made with transferee's consent, 343.
Applies to stockholder on books and to equitable owner also (C. C. 322), 360.
As to guardians, trustees, etc. (C. C. 322), 360.
Trust funds not liable in certain cases (C. C. 322), 360.
Nor pledgee in certain cases (C. C. 322), 361.
But pledgor is liable (C. C. 322), 361.
Stockholders of foreign corporations doing business in this state liable (C. C. 322), 361.
Liability joint, not several, 366, 388.
No difference between common and preferred as to liability for debts (C. C. 290), 361.
Liability substantially the same under the constitution and the statute, 362.
No exemption—courts and legislature no power to make, 362.
Liability in other states, 362.
No such liability at common law, 363.
As principal, not surety, 363, 365.
Creditor holding security no defense to liability, 364.
Creditor not bound to sue corporation first, 364, 394.
Liability same in a *de facto* corporation, 365.
For proportion only (Const., art. 12, sec. 3; C. C. 322), 359, 360, 365, 366, 377.
Action to recover is upon contract, 366.
Estate of decedent liable, 368.
Who are stockholders (C. C. 322), 360, 368 *et seq.*
Giving away stock before debt incurred, 370.
Pledgee, liability of, 372.

STOCKHOLDER'S LIABILITY—*(Continued)*
Trustee, liability of, 373.
Club members, liability of, 378.
Measure of liability, 377.
Contribution, 378, 379.
When liability arises, 376.
One surety against another, 379.
No liability for bonds issued without consent of stockholders, 377.
Payment of prior debt, a voluntary one, 380.
Payment of debt of corporation does not satisfy subscription, nor can he offset debt due himself, 380, 390.
Payment of proportion of any debt satisfies as to that debt only (C. C. 322), 360, 378, 390.
Stockholder can not prefer creditor by paying all he owes to him, 392.
Effect of corporation releasing subscribers, 381.
Creditors may release or waive, 380, 381.
Or Articles of Incorporation may exempt, 380.
Foreign corporations—rule the same, 382.
Under foreign laws—what enforceable, 382.
Liability on subscriptions and under the constitution and statute distinguished, 386, 389, 460, 468.
Payment of this liability does not release subscription liability, 393.
Are independent of each other, 386, 387.
Subscription liability contractual, 389.
Capital and unpaid subscriptions a trust fund, 386.
Capital and subscriptions an asset of corporation, 387, 388.
Stockholder who is also a creditor may enforce, 388, 392.
If corporation insolvent assessment may be made up to par, 395.
Receiver of insolvent bank can not enforce, 389, 390.
If one corporation for stock owned in another, 394.
Assignee of stock not full paid, liable for full payment, 389.
Giving stock away—effect of, 370, 399.
Creditor may sue for balance unpaid on subscriptions, 388, 391.

STOCKHOLDER'S LIABILITY—*(Continued)*
Creditor may join several stockholders in suit, 394.
Limitation three years from creation of debt (C. C. 359), 339, 400.
Stockholder can not prefer one creditor, 392.
Debt not maturing within three years stockholder escapes, 409.
Judgment against corporation conclusive against stockholder, 392.
Limitation not extended by corporation extending debt, 402.
Several stockholders may join in suit, 392.
Begins with call on verbal agreements, 404.
Begins when corporation makes contract, 407, 408.
Limitation may be waived by stockholders, 404.
Limitation as to sureties and guarantors, 405.
Limitation on debts secured by mortgage, 407.
Limitation on contracts for attorney's fees, 407.
Limitation on national bank stock, 408.
Limitation in case of foreign corporation, 408.
Limitation, absence from date *not* deducted, 408, 409.
Limitation when debt does not mature within three years, 409.
Limitation not affected by time of discovery, 400, 409.
Transfer of stock does not affect limitation, 401.
In case of subrogation, 401.
As to deposit in banks begins at date of each deposit, 402.
Limitation of code not unconstitutional, 404.
Limitation on sale of stock agreeing to hold purchaser harmless from stockholder's liability, 407.
Liability on mortgage debt for the whole, not simply for the deficiency, 407.
Liability in case of over-valued property given for stock, 395 *et seq.*
Liability to pay debt of corporation created by law so far as statute of limitations, 399.
Creditor entitled to full dividends on insolvent estate even if he has collected part of his claim of stockholders, 393.

STOCKHOLDER'S LIABILITY—*(Continued)*
Creditor holding security still has claim to full liability of stockholder, 394.
No difference between common and preferred, 414.
Distinction between statutory liability and liability to pay up to par, 460, 468.

STOCKHOLDERS' MEETINGS
See Directors; Elections; Voting.
To increase or diminish capital stock must be called and notice published (C. C. 359), 117.
Quorum, by-laws may provide but not less than majority of *subscribed* stock (C. C. 303, 312), 151, 154, 182, 183.
Less shares cancelled by assessment, 184, 194, 487.
At election may vote in person or by proxy (Const., art. 12, sec. 12; C. C. 307; C. C. 312; C. C. 321b), 173, 182.
May cumulate vote (Const., art. 12, sec. 12; C. C. 307), 167, 170.
To be by ballot (C. C. 307), 167.
To be held at office of company (C. C. 319), 27, 198.
Apply to foreign corporations electing directors at meeting held in this state (C. C. 307), 168.
If right to cumulate votes denied, election is void, 168.
Highest number of votes elects, 168.
All directors must be voted for at one time, 171.
Vote may be corrected before canvassed, 173.
Quorum—at all meetings a majority of the subscribed stock must be present (C. C. 312), 182, 183.
The call and waiver of notice in certain cases (C. C. 302, 317), 175, 177, 191, 192, 195, 225, 232.
Voter must own stock, in his own name, on the books ten days before election (C. C. 312), 183, 506.
Mandamus to compel call, 204, 232, 680.
For violation of these provisions any stockholder may set aside vote (C. C. 312), 183, 199.
Regular or called meeting may be adjourned from day to day or time to time (C. C. 312), 183.
Adjourned meetings—confusion in regard thereto (C. C. 310, 312, 314), 183, 191, 192.
See adjournments of directors' meetings, 229.

STOCKHOLDERS' MEETINGS—*(Continued)*
If no quorum present (C. C. 312 and 314), 183, 191, 192.
Or if no election had, 183, 192.
Reasons therefor to be entered on directors' minutes, 183.
Justice of peace may call in certain case (C. C. 311), 198.
Notice of meeting must state object is election, 191.
Removal of directors, meeting for, 235.
Call for such meeting, 235.
Present means in person or by proxy (C. C. 312), 183, 184.
A stockholder who has sold stock not yet transferred can vote, 184.
Who is a stockholder? 184 *et seq.*
Pledgor usually to vote (C. C. 313), 191.
Pledgee may vote if pledgor fails to vote if not otherwise agreed (C. C. 313), 191.
Guardians, administrators, etc., vote (C. C. 313), 191.
Trustee may in certain cases, 191.
Stock of one corporation held by another, who votes? 192.
Treasury stock can not vote, 184, 194, 487.
By consent given in a certain manner, valid (C. C. 302, 317), 175, 195.
Any stockholders' meeting may elect officers to fill vacancies (C. C. 318), 196.
When so assembled may do any business as at regular meetings, 196.
Can not ratify act which directors had no power to do, 210.
Stockholders can not hire employees, 210.
Financial statement to be furnished at annual meeting (C. C. 302a), 196, 197.

STOCKHOLDERS' SUITS
Equity will intervene, 249.
No suit by stockholder unless corporation refuses to bring, 80, 249, 254.
Sues only for what the corporation could sue for, 250.
Can not sue for personal wrongs, 250.
Corporation must be made a defendant, 254.
Also directors and outsiders, 249, 250, 254, 258.

STOCKHOLDERS' SUITS—*(Continued)*
Corporation said to be like person under disability, 250, 251.
Court controls case, 252.
When demand unnecessary, 254.
Substitution of corporation as plaintiff, 252.
Shareholder bringing suit has sole right to conduct it, 253, 255.
Shareholder bringing suit is a trustee under control of court, 254.
For fraud does not matter if contract executed, 257.
For fraud not necessary to restore receipts, 257.
For fraud unaffected by approval of majority, 257.
Can not sue for individual part; must sue for benefit of all, 257.
Sufficient if one of the plaintiffs (?) is stockholder, 257.
Misjoinder of suits, 258.
When directors should be made defendants, 258.
No matter (in state courts) if stockholder acquired stock after acts complained of, 259.
In the United States courts rule is different, 259.
No libel based on allegations of complaint, 260.
Officers can not use funds of corporation in defense, 259.
See distinction as to all participating in benefits of suit in actions against directors, 418.
Limitation in case of fraud three years from his discovery, 260.

SUBSCRIPTIONS FOR STOCK
See Stock—under this sub-title.

SUCCESSION
Definition of, 80.

SUMMONS—SERVICE OF
Is made by delivering a copy of the summons and complaint, if domestic corporation,
To the president, or
Other head of the corporation, or
Vice president, or
Secretary, or

SUMMONS—SERVICE OF—*(Continued)*
Assistant secretary, or
Cashier, or
Managing agent.
If foreign corporation—
If doing business in the state and having managing or business agent, or cashier or secretary within the state, upon such agent, cashier or secretary.
If it have no such agent, etc., by publication.
Or if it has designated a person, upon such person.
Or if no person designated, upon the secretary of state (C. C. P. 410, 411, 412; C. C. 405), 569.
A "teller" of a bank is not a managing agent, 570.
Nor a clerk in a store, 571, 576.
As to service upon *de jure* president where there is a *pro tem.* president, 570.
In contempt proceedings, violating injunction, service on attorneys, good, 570.
Sheriff's return, or affidavit of private person, *prima facie* evidence, 570.
President of foreign corporation not presumed to be managing agent, 571.
Foreign corporation must be "doing business" in state, 571.
What is "doing business," 608, 610, 611.
Domestic corporation may be served by publication in some cases, 571.
Suit brought by attorneys, good, 571, 572.
If sued under wrong name, 572, 573.
Corporate character alleged, and not denied, 572.
That plaintiff is not a corporation raised only by answer, 572.
Allegation that defendant is a corporation not necessary to jurisdiction, 572.
Whether person served is an officer to be determined by court, 572.
Corporation may record certificate of its place of residence for service of process (C. C. 1163), 573.

SUPERINTENDENT
Can not be deprived of his salary because he is a director, 159.
If no agreement, a *quantum meruit*, 159.
Corporation may be estopped to deny validity of contract of manager with, 160.

SOUTH MOUNTAIN CASE
Doctrine doubted, 497.

TAXATION
Mortgages, deeds of trust, contracts or other obligations securing money are not subject to taxation (Const., art. 13, sec. 1), 638.
Shares of stock not taxable (Pol. C., 3608), 639.
But shares of stock in national bank are not exempt (Pol. C. 3608), 639.
OF PROPERTY—RULES OF
DOMESTIC CORPORATIONS
If all of its property is in the state stock is not taxable, 643.
Property outside the state, shares are taxed in proportion to value of same compared to whole property, 643.
Special rules for, if some property of domestic corporation is out of state, 643.
Query as to shares held by non-residents, 643.
FOREIGN CORPORATIONS
Query as to shares held by residents, 643.
But actually taxed at full value, 643.
PUBLIC SERVICE CORPORATIONS
A special method provided and all goes to the state, 644.
FRANCHISE TAX LAW of 1911, 1913, 644, 672 *et seq.*
New annual license, 651.

TERM OF EXISTENCE
Not exceeding fifty years (C. C. 290), 29, 42.
May be extended fifty years (Const., art. 12, sec. 7), 29, 42.
Quasi public can not be extended, 29, 42.

TERM OF EXISTENCE—*(Continued)*
Officers to make certificate of extension (Const.), 42.
Consent of two-thirds stock necessary, 42.
See conflicting provisions of Civil Code, sec. 401, 42, 43.

TRANSFER BOOKS
To be kept at office or principal place of business (Const., art. 12, sec. 14), 70.
Stockholders' right to inspect, 70.
Duty of pledgee as to entry upon, 335.
Tracing shares by books, 343.

TRANSFER OF STOCK
See Stock—same sub-title.

TRUST COMPANIES
Must obtain subscription of two hundred thousand dollars of stock. paid in, before can be incorporated (C. C. 290a). 46.
No one but a "trust company" can use the words "trust" or "trustee" in its name (C. C. 290½), 46, 47.
Dissolution of, 47.

TRUSTEE
Can not vote stock (unless otherwise agreed) except where beneficiary fails to represent same (C. C. 313), 191.
May give proxy (C. C. 321b), 174.
If several, the United States rule is they may appoint one of their number proxy (note), 193.
Word "trustee" in certificate is without legal significance, 336, 339.

ULTRA VIRES
Corporation can engage in no business not expressly authorized in its charter (Const., art. 12, sec. 9), 93.
United States supreme court extends doctrine widely, 93.
Judge Sawyer's definition, 93.
General consideration of doctrine, 93 *et seq.*
Fruits can not be retained and liability renounced, 95, 96.
Doctrine liberally construed as to executory contracts, 97, 99.
In absence of proof, must be *ultra vires* on its face, 100.

ULTRA VIRES—(Continued)
May borrow money to carry out *ultra vires* acts, 100.
Doubtful whether corporation can borrow money on its "treasury stock," 101.
As to sale of real estate, 102.
As to water company charges, 102.
If contract still executory, corporation may dispute, 263.
If against public policy, 102, 103.
Liable for torts, notwithstanding, 96.
Combinations and monopolies, 103.
Issuing bills to circulate as money prohibited, 103.
Treasury stock pledged for debts of corporation, 101, 114.

VENUE
A corporation may be sued in the county—
Where the contract was made.
Where the contract is to be performed.
Where the contract obligation arose.
Where the contract liability arose.
Where the contract breach occurred.
Where its "principal office" is located.
Subject to removal as in other cases (Const., art. 12, sec. 16), 549.
The place of residence of a corporation is where it has its "office or principal place of business," 558.
Foreign corporation has no residence in this state, 523, 560, 568.
Statute gives the right to have the action tried there, when brought in one of these places, subject to removal as in other cases, 449, 550.
Principal "other cases," 560.
Discussion of subject, 549-564.
Constitution above applies also to action in tort, 564.
If one of several defendants it may be sued where any of them reside, 564.
Burden of showing "other case" is on plaintiff, 564.
Venue of suit to set aside mortgage is the residence of the mortgagee, 564.
Under insolvent law, 565.
A corporation in a stockholder's suit is a nominal defendant and can not prevent removal, 565.

VENUE—*(Continued)*
In a case of foreclosing a pledge of stock, 566.
On a promissory note, 566.
In attachment, 566.
Defendant against whom no cause of action shown, does not affect venue, 567.
Action for damages is transitory, 567.
In suit by a county against a foreign corporation, 568.
If a foreign corporation, it has no rights of venue on ground of residence, 523, 568.

VICE PRESIDENT
Not created by statute but by-laws probably may create (C. C. 354), 72, 161.

VOTING
See Directors; Elections; Stockholders' Meetings.
Common and preferred shares have equal powers; no distinction can be made (C. C. 290), 20, 31, 32.
By proxy and cumulative (Const., art. 12, sec. 12; C. C. 307), 167, 170.
Majority vote—highest vote, 168, 236.
For directors must be all at one time, 171.
Who may vote at elections (C. C. 321b), see Elections, 173.
Votes may be corrected before canvassed, 173.
Voting trusts and pooling stocks are legal, 179.
Pledgor or pledgee, 190.
By-laws can not give or take away right, 188, 189.
Treasury stock can not vote, even by pledgee, 103.
Stock of one corporation held by another corporation, 192.
Viva voce voting, 189.
Any vote contrary to certain sections of code may be set aside (C. C. 301, 321b), 147, 173, 193.
Pledgor (usually) and trustee guardian and executor (C. C. 313), 191.
Treasury stock can not vote, 194.

WATER COMPANIES
May organize under the general law, 16.
By-laws of, 161.
Stock appurtenant to land, 345.
Transfer of (C. C. 324), 306.
Stock may be assessed, 345, 466.

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